90-1613

No. _____

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In The

Supreme Court of the United States

October Term, 1990

LAKEVIEW DEVELOPMENT CORPORATION,
a California corporation,

Petitioner,

v.

CITY OF SOUTH LAKE TAHOE,
a Municipal Corporation,
the TAHOE REGIONAL PLANNING AGENCY,
a separate legal entity created pursuant to an interstate Compact between the States of Nevada and California,

Respondents,

and

PEOPLE OF THE STATE OF CALIFORNIA
Ex Rel. John K. Van de Kamp,
Attorney General of the State of California,

Intervenor-Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

LAWRENCE L. HOFFMAN
Counsel of Record
JAMES K. BURAU
PATRICIA L. JOHNSON
HOFFMAN, LIEN & FACCINTO
3000 North Lake Boulevard
Post Office Box 7740
Tahoe City, California 95730
(916) 583-8542
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Has a property owner, who has obtained all final, discretionary governmental approvals for a residential Planned Unit Development ("PUD") project, and thereafter completed construction of approximately 85% of the project at a cost in excess of $13 million in reasonable, good faith reliance on such approvals, acquired a legally cognizable "vested right" enabling the owner to complete the project as originally approved, as against the belated assertion of jurisdiction by a regulatory agency which acquiesced in the project's build-out for more than 11 years?

2. Is that "vested right" so obtained a "property right" entitled to the constitutional protections against deprivation without due process of law and prohibiting uncompensated takings of private property?

3. Did the Court of Appeals, after first assuming that a vested right may have been properly acquired in the first instance only to find it had later "evaporated" simply because the project took longer to complete than originally anticipated, fashion a principle of law that starkly conflicts with established precedents of this Court and other jurisdictions?

4. Did the Court of Appeals, by relying on unsupported factual inferences from the record not found by the trial court, and then disposing of a highly complex land use case on summary judgment in the face of a myriad of hotly contested material issues of fact, so abrogate its judicial responsibilities as to call for an exercise of this Court's power of supervision?

PARTIES TO THE PROCEEDING

The Petitioner is Lakeview Development Corporation, a family-owned California corporation, which was at all relevant times the owner and developer of the real property that is the subject of this litigation. Lakeview Development Corporation is not a subsidiary of any parent corporation.

The Respondents include the Tahoe Regional Planning Agency, a separate legal entity created pursuant to an interstate compact between the states of California and Nevada; the City of South Lake Tahoe, a municipal corporation organized and existing under the laws of the State of California, which has not participated actively in this litigation; and the Intervenor-Respondent People of the State of California Ex Rel. John K. Van de Kamp, Attorney General of the State of California, acting pursuant to the powers vested in him under Calif. Gov't Code § 12500 *et seq.*

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Lakeview Development Corporation, a family-owned California corporation, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals, filed on September 28, 1990, is reported at 915 F.2d 1290.[1] App. A, 1a-25a. The unreported Memorandum and Order of the District Court denying defendants' motion to dismiss as to the vested rights claim, and granting dismissal as to the monetary claims, entered on March 12, 1986, is found at App. B, 26a-31a. The unreported Findings of Fact, Conclusions of Law and Order of the District Court granting summary judgment in favor of the defendants as to the non-monetary claims, which was entered on January 12, 1989, is found at App. C, 32a-39a.

JURISDICTION

The matter having been argued and submitted on April 18, 1990, the decision of the Court of Appeals was filed on September 28, 1990. A timely petition for rehearing and/or suggestion for rehearing en banc was denied on December 17, 1990. App. D, 40a-41a. By order of Justice Sandra Day O'Connor dated March 6, 1991, Petitioner's time to file this Petition was extended to April 17, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution:

"No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

"Section 1 . . . nor shall any State deprive any person of life, liberty, or property without due process of law; . . . "

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[1] Authored by Hon. Betty Fletcher, and joined by Hon. Stephen Reinhardt and Hon. Pierce Lively, Senior Circuit Judge for the Sixth Circuit.

The Tahoe Regional Planning Agency ("TRPA") is a separate legal entity created pursuant to the Tahoe Regional Planning Compact (the "Compact") entered into between the States of California and Nevada, as amended effective on December 19, 1980. Pub.L. 96-551, 94 Stat. 3233; Cal. Gov't Code §§ 66800-66801; Nev.Rev.Stat. §§ 277.190-.200. The specific regulatory provisions sought to be imposed by TRPA to block the completion of the remaining portion of the project at issue are described at footnote 4 below.

STATEMENT OF THE CASE

A. Introduction

This case involves the plight of a small, family-owned development entity known as Lakeview Development Corporation ("Lakeview")[2] which has spent (or incurred debt) in excess of $13 million in completing the construction and/or sale of approximately 85% of a small development project on a 4-acre site in South Lake Tahoe, California ("the City"), only to find it is now precluded from completing the remaining portion of its project as the result of the belated exercise of jurisdiction over the project by TRPA. Thus, more than 11 years after TRPA came into existence in 1970,[3] during which period it watched the project being built-out and acquiesced in its continued construction, TRPA first asserted its jurisdiction in 1981 to block the completion of the remainder of the project. That assertion of jurisdiction was allegedly based on

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[2] Lakeview Development Corporation is a California corporation organized primarily to undertake the project at issue. All of its stock is held by Lakeview's President, Mr. Nat Sinclair, and his family.

[3] The Tahoe Regional Planning Compact creating the TRPA became law on December 18, 1969. Pub.L. 91-148, 83 Stat. 360. However, TRPA was formally organized and came into existence on March 19, 1970. *People Ex Rel. Younger v. County of El Dorado*, 5 Cal.3d 480, 489 (1971).

its newly-adopted requirements following the reconstitution of the TRPA by amendments to its bi-state Compact in 1980.[4]

The project itself, as originally fully approved in 1968-70 by all regulatory agencies then having jurisdiction – the City of South Lake Tahoe and the California Tahoe Regional Planning Agency ("CTRPA")[5] – involved the development of a small Planned Unit Development ("PUD") pursuant to the terms of a master Special Use Permit, and in accordance with the provisions of a Tentative Subdivision Map and two recorded Final Subdivision Maps approved by the applicable regulatory agencies.[6] The project as originally approved contemplated the development of a 158-unit hotel (later changed to 160 units) which has been constructed, sold, and is fully operational, as well as the construction of nine, two-story

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[4] By amendments to the Compact which became effective December 19, 1980 (Pub.L. 96-551, 94 Stat. 3233), TRPA was significantly reconstituted and given new regional planning responsibilities in the Lake Tahoe Basin. In the spring of 1981, TRPA adopted its Ordinance 81-5 which, in relevant part, prohibited building of multi-family residential structures on lands identified by TRPA as being located in so-called Land Capability Districts 1, 2, or 3. A similar restriction was included in TRPA's 1984 Regional Plan, which was superseded by its 1987 Plan. Because most of Lakeview's remaining project is identified by TRPA as being in Land Capability District 2, TRPA now asserts that it is subject to these new regulatory prohibitions precluding development.

[5] The CTRPA was the only regional planning body having jurisdiction on the California side of the Lake Tahoe Basin prior to the creation of TRPA. See Calif. Gov't Code §§ 67000-67131. Following formation of TRPA, the five CTRPA Board members also became the California members on the TRPA Governing Board.

[6] The first Final Map (the Unit 1 Final Map), recorded on November 7, 1969, depicts the initial four townhouse complexes containing a total of 14 units as well as the common recreational facilities serving the entire PUD project, while the second Final Map (the Unit 2 Final Map), recorded on November 24, 1970, depicts the parcel for the hotel as well as the parcels for the remaining five townhouse complexes containing the remaining 28 townhouse units. Lakeview, not the regulatory agencies, made the business decision to file two separate Final Maps to facilitate construction financing, and orderly development.

townhouse residential clusters containing a total of 42 separate units (small 2-3 bedroom vacation units) configured around a central recreational complex containing a swimming pool, hot tub, clubhouse and related facilities.[7]

To date, in addition to the 160-unit hotel and related facilities, four of the townhouse clusters containing a total of 14 units have been constructed and sold, leaving only the remaining five clusters, which contain a total of 28 individual units, to be constructed. It is these 28 remaining townhouses, a part of the so-called Unit 2 Final Map, which are at issue in this litigation. The construction area for the remaining townhouse units has been cleared and rough-graded, and all drainage and related improvements are installed. Only the belated assertion of TRPA's jurisdiction now blocks the completion of those remaining 28 units, which constitute approximately 15% of the total 200-unit PUD project.

Thus, this case concerns the increasingly frequent and vexing question[8] of at what point in time, and under what

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[7] A diagram depicting the components of the "Heavenly Valley Townhouses & Hotel" project was appended to Lakeview's Opening Brief below, and is reproduced at App. F, 58a.

[8] Numerous commentators have recently addressed this critically important area of land use law. As the authors of one recent scholarly assessment observed: "Vested rights issues arise more frequently today than in the past because of ever increasing volatility of land use regulations." Hanes and Minchew, *On Vested Rights to Land Use and Development*, 46 Wash & Lee L.R. 373, 377 (1989). The Board of Trustees of the Urban Land Institute has also stated: "As an issue, vested rights have grown steadily in significance as the development process has lengthened and become more complex and costly and as more public regulation over development has become more stringent and changed more frequently. See, *Protection of Vested Rights in the Development Process: Recommended Actions*, Zoning and Planning Law Handbook (1983) p. 79; and see, Siemon, Larsen & Porter, *Vested Rights: Balancing Public and Private Development Expectations* (1982), at p. 2: "During the 1970s, over 1,000 court cases involving the vesting issue resulted in published opinions. How many more were tried but unreported is unknown, but published opinions in this area of litigation continue to flood the official

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circumstances, a property owner is said to acquire a legally-protected "vested right"[9] to complete the remaining portion of a nearly complete development project as against a subsequent assertion of jurisdiction by a new regulatory agency; whether a "vested right," once properly acquired, is a "property right" subject to the constitutional protections of the Fifth Amendment;[10] and whether a vested property right, once properly acquired, can subsequently "evaporate," as the Court of Appeals said, due merely to unforeseen financial and other difficulties which prevented the project from proceeding at the pace originally contemplated by the developer.

B. The Court of Appeals Goes Far Astray

Possibly no more graphic example of the need for judicial clarification can be found than the instant case, where the Court of Appeals, in a hotly contested, factually-dependent case, has now interjected untold confusion and uncertainty

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reports of most states. Moreover, in recent years, at least three major U.S. Supreme Court cases have addressed legal principles involving vested rights."

[9] As the court stated in the seminal case of *Avco Community Developers, Inc. v. South Coast Regional Commission*, 17 Cal.3d 785, 791 (1976), "[I]f a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit." (Citing *Dobbins v. City of Los Angeles*, 195 U.S. 223 (1904)).

[10] It has not been judicially determined whether the Fourteenth Amendment applies to TRPA. Although TRPA is a separate legal entity, not an arm or agency of the compacting states (*Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 400-402 (1979)), on the other hand it has also been stated that Congress did not intend to make applicable to the Compact the entire panoply of federal administrative and substantive standards. *CTRPA v. Jennings*, 594 F.2d 181, 190 (9th Cir.1979), *cert. denied*, 444 U.S. 864 (1979). Although Lakeview's Complaint pleads violations of both the Fifth and Fourteenth Amendments, for convenience we refer hereafter only to the Fifth Amendment.

into this important area of the law, both by choosing to resolve this case on summary judgment, and most importantly, by holding for the first time in any reported case that a vested property right can "evaporate" merely because a development project took longer to complete than originally anticipated. Thus, after acknowledging or assuming that Lakeview had obtained all required final, discretionary land-use approvals prior to commencing construction of its project, and assuming that Lakeview had met the requisite criteria to *acquire* a legally-cognizable "vested right" to proceed with the project, the Court of Appeals then proceeded to chart entirely new legal waters, concluding that Lakeview's vested property right subsequently and summarily "evaporated" when Lakeview did not complete construction of its project at "a pace reasonably close" to that originally contemplated. As the Court put it:

> "For even if we were to decide these issues in favor of Lakeview, its claim to a vested right would still fail, because it did not act expeditiously enough in proceeding with the development of the Unit 2 townhouses." App. A, 18a.[11]

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[11] Although we have been unable to identify the factual basis for this assertion, it appears that the Court of Appeals based it determination on inferences it drew from a single sentence contained in the Minutes of a public hearing held 20 years earlier. The Minutes of that early Planning Commission hearing contain the following excerpt:

> "It was stated that the applicant would like to have at least a large portion of this development in operation by December of this year; the design is done in two phases, contemplate [sic] a 3-6 month span of time between phase 1 and phase 2." See CR, 77:91 (Clerk's Record on Appeal).

All that we can surmise from our exhaustive search of nearly 5 inches of the record below, is that in order to conclude that Lakeview "did not act expeditiously enough," the Court of Appeals appointed itself the Super-City Council, reached into the record and plucked out this truncated summary of some anonymous testimony given 20 years ago, and then unilaterally amended the Special Use Permit. Absolutely

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Acknowledging that, although Lakeview had decided to alter its planned sequence of construction so as to proceed with the development of the Unit 2 hotel ahead of the Unit 2 townhouses, the Court of Appeals concluded, without the benefit of any authority whatsoever, that a:

> "[G]overnment's commitment to a 'planned unit development' is necessarily conditioned on the developer's [sic] proceeding at a pace reasonably close to that contemplated at the time the project was approved." App. A, 21a.

It based this assertion on the following premise:

> "When, as in this case, the government does not interfere until well after the time the developer could have complete the entire project, the reason for recognizing a vested right *evaporates*." [emphasis added] App. A, 20a.

It is respectfully submitted that this newly-articulated principle of "evaporation" of vested property rights, due only to unforeseen delays, creates such instability in the area of well-settled land use law, stands in such direct conflict with established precedents from other jurisdictions, and creates such a patently unfair and inequitable result, that this case clearly warrants this Court's review.[12]

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nothing in the record below, however, supports this inference, nor was it a factual finding made by the trial court. Is it not more reasonable to assume that, had the governmental agencies which approved the project been concerned about the length or sequence of construction, they would have specifically fashioned their 13 conditions of approval to address these concerns?

[12] One can only speculate as to the potential for abuse. For example, does the Court of Appeals' Opinion now open the door for a public agency, in the name of new-found environmental concerns or possibly recent public pressures, to decide to deny building permits for the construction of the last two houses in a fully-approved, nearly complete ten-home subdivision, merely because the developer had delayed final construction due to unexpected market slowdown?

Furthermore, since it is well settled that a vested right is a legally protected "property right" subject to the protections of the Constitution, how can such a right summarily be "taken" absent prior notice, public hearing or any other vestige of procedural due process, and without just compensation, merely on the premise that the reason for its recognition "evaporated" because of unforeseen delays in completing the project?

C. Factual Background

At the outset of its Opinion, the Court of Appeals set forth a lengthy summary of many of the relevant facts which space precludes restating here. App. A, 2a-8a. (Also see the allegations of the verified Complaint filed on July 12, 1985. App. E, 42a-57a.) While there were and are significant disputes as to some of those material facts, the key facts as to the initial approvals obtained by Lakeview from the City's Planning Commission, City Council, and from the CTRPA, and the substantial construction undertaken by Lakeview in good faith reliance upon those approvals, are not in significant dispute. Thus there is little dispute that Lakeview applied for and received all final, discretionary land use approvals necessary to undertake the project. There is also no dispute that, in order to facilitate financing and the orderly development of the project, Lakeview divided the construction into two phases by obtaining approval of and thereafter recording two Final Subdivision Maps pursuant to California law.[13]

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[13] It was uncontested below that Lakeview spent approximately $1-million to acquire the property. It was also uncontested below that, in reliance on the Special Use Permit and approved Final Maps, Lakeview spent $1.5-million in grading and clearing the entire site, constructing the on-and off-site drainage and erosion control facilities to serve the entire PUD site, and in constructing the Unit 1 townhouses and the common recreational facilities. Moreover, the Unit 1 work was completed in 1973 – not 1971 – as the Court of Appeals stated at App. A, 3a. Thus there was no gap between the completion of Unit 1 in 1973, and the commencement

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While Lakeview initially intended to follow construction of the first four townhouse buildings (containing 14 units) depicted on the Unit 1 Final Map with the construction of the remaining five townhouse complexes in Unit 2 (the remaining 28 units), and then to construct the hotel component of the Unit 2 Final Map, instead Lakeview decided in early 1974 to reverse the sequence of the remaining construction – that is, to build the hotel first, and then construct the remaining 28 townhouses after completion of the hotel. As discussed above, nothing in Lakeview's project approvals held it to any particular sequence of construction, nor for that matter any timeline for completion of construction. Those decisions were properly left to Lakeview's business judgment.

There is no dispute that the first 14 townhouse units were constructed in good faith reliance on the Special Use Permit and the Unit 1 Final Map. There is also no dispute that the hotel, recreational facilities and other amenities and improvements were constructed in good faith reliance on the Special Use Permit and the Final Maps. Only the remaining five townhouse complexes (28 units), a portion of the partially completed Unit 2 Final Subdivision Map, are at issue in this litigation due to TRPA's belated effort to block their construction.

While Lakeview concedes that the project took longer to construct than it had originally anticipated, there is no dispute that Lakeview used its best efforts to bring the project to fruition, and diligently pursued construction during each building season until TRPA asserted jurisdiction in 1981.[14] Thus, after the first 14 townhouse units were completed in

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of the hotel in 1974. Finally, there was no dispute below that Lakeview expended in excess of $10-million in construction of the hotel and other Unit 2 improvements. To what extent those monies were spent in reliance on its permits is a factual issue which the lower courts did not address, and therefore remains to be determined.

[14] The regulatory requirements and winter weather conditions at Lake Tahoe normally limit outside construction and earth moving to the period of May 1st through October 15th.

1973 following three years of construction,[15] during the next building season Lakeview entered into a joint venture to secure construction financing, obtained the necessary building permits from the City, and commenced construction of the hotel, a component of the Unit 2 Final Map.

Significantly, when Lakeview elected to commence construction of the hotel in 1974, TRPA advised Lakeview and the City that it intended to exercise its jurisdiction, and that a TRPA "adminstrative permit" would be required. However, as the Court of Appeals expressly noted (see App. A, 5a-6a), after the City responded to TRPA that, in the City's judgment, it believed the project was "grandfathered," TRPA withdrew its opposition and took no further action with respect to the construction of the hotel, thereby acquiescing in the continued build-out of the project.

After Lakeview commenced construction of the hotel, it continued with construction of the hotel during each of the next five building seasons, although the pace of that construction admittedly was slowed by a series of unexpected financial and partnership difficulties, which ultimately caused Lakeview to sell the partially-completed hotel in 1979.[16] Prior to the sale of the hotel 1979, however, construction of the hotel component of the Unit 2 Final Map had progressed to include excavation of the foundations for the hotel and its underground parking structure, construction of retaining walls, installation of two 10,000 gallon fuel storage tanks, preparatory work for the main parking structure and entrance facilities, construction of extensive drainage improvements to

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[15] See footnote 13.

[16] The partially-constructed hotel was sold in June, 1979. In October 1979, CTRPA advised the new owners that its earlier approval of the project was no longer valid and threatened to issue a stop-work order. Litigation ensued, resulting in a settlement which allowed construction to proceed to completion. At no time did TRPA seek to intervene or become a party to that litigation or settlement between CTRPA and Lakeview. The hotel was completed and opened in 1984.

service the hotel, and completion of construction of all on- and off-site subdivision drainage and road improvements, at an approximate cost to Lakeview of an additional $10.4 million.[17]

Having sold the hotel, Lakeview turned its attention to completion of the remaining 28 townhouses in Unit 2. In the summer of 1981, Lakeview met with officials of the City, at which time it was agreed that the City would contact TRPA regarding Lakeview's right to complete the remainder of the project. In late 1980, by adoption of amendments to the Compact, TRPA had been reconstituted and given new powers, making it difficult to ascertain it's position on this issue. When, through an exchange of correspondence and meetings, it became clear that TRPA intended to assert jurisdiction over the project, the City decided that it could not issue further building permits until Lakeview first obtained clearance from TRPA. During the same period, Lakeview arranged to refinance the construction of the remaining townhouse units. On July 18, 1984, TRPA's legal counsel advised Lakeview in writing that, "absent an advance request for determination of vested right [sic] by the TRPA Governing Body, we ask you not to commence construction of the project." CR 77:212. However, due to unrelated litigation filed against TRPA concerning the adoption of its 1984 Regional Plan, which resulted in an injunction against implementation of the Plan, as the Court of Appeals expressly acknowledged, TRPA was prevented from making such a vested rights determination. App. A, 7a. Nevertheless, Lakeview attempted to resolve the matter amicably, and only after extensive but unsatisfactory discussions between Lakeview and TRPA was

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[17] CR 52:64-68. Further, to date at least nine building permits have been routinely issued by the City upon Lakeview's request, as each subportion of the project progressed. CR 52:56 and 77:111, 112, 114, 135-138, 140-143, 145, 146, 154, 165, 166.

Lakeview compelled to commence this litigation by the filing of its four-count Complaint on July 12, 1985. App. A, 7a.[18]

D. Proceedings Below

The District Court (Hon. Raul A. Ramirez, E.D. Cal.) first addressed the issues in this case on motions to dismiss brought by TRPA against Lakeview's First, Third, and Fourth Claims for Relief. As to Lakeview's claim for declaratory and injunctive relief to establish its vested right to complete construction of the 28 townhouses at issue, the District Court, in its March 12, 1986 Order, expressly found that Lakeview had stated a valid claim for vested rights, concluding:

> "[T]hat plaintiff has stated a sufficient claim for 'traditional' vested rights based upon plaintiff's substantial expenditures in good-faith reliance upon governmental approval of the final subdivision map." App. B, 29a.

Further, with respect to Lakeview's

> " . . . claim for vested rights based on TRPA's acquiescence, the Court cannot find, taking all of plaintiff's well-pleaded allegations as true, that plaintiff has not stated a claim upon which relief can be granted . . . the court finds that plaintiff has certainly alleged a claim for relief for estoppel based on TRPA's acquiescence." *Id.*[19]

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[18] The Complaint included: First Claim – declaratory and injunctive relief based on vested rights; Second Claim – injunctive relief based on denial of due process; Third Claim – damages for inverse condemnation; and Fourth Claim – damages and attorneys' fees pursuant to 42 U.S.C. §§ 1983 and 1985. App. E, 42a-57a.

[19] As to plaintiff's Third and Fourth Claims for Relief, which sought monetary damages from TRPA for inverse condemnation or were based upon 42 U.S.C. § 1983, the District Court found itself compelled to deny those claims for relief based on the earlier decision in *Jacobson v. Tahoe Regional Planning Agency*, 556 F.2d 1353 (9th Cir.1977), in which the Ninth Circuit had found that TRPA was immune from damage claims because it did not have direct condemnation power. *Jacobson* was expressly overruled by the Court of Appeals in this case. App. A, 24a.

Nearly three years later, in spite of its earlier ruling, a after efforts to settle the litigation had not proven successfu and after the belated intervention of the State of Californ acting through its Attorney General,[20] the matter was r briefed and re-argued to the District Court on motions f summary judgment. In support of its motion for summa judgment, the Intervenor California Attorney General submi ted to the District Court a 42-page memorandum of points a authorities, fully half of which comprised a statement of fac Attached to that memorandum was a 28-page affidavit of t trial deputy handling the lawsuit, which contained his versi of the facts of the case, supplemented by 46 separate writt exhibits appended thereto. The Attorney General also submi ted a 48-page reply memorandum along with 31 addition lengthy written exhibits.[21] Lakeview, in opposition to t

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[20] The California Attorney General chose to seek intervention mo than 28 months after the action was filed, and only after the District Co had acted in Lakeview's favor on the motion to dismiss and the parti had tentatively reached a settlement. In granting California's motio Judge Ramirez commented from the bench:

> "I'm going to permit the intervention. I do so hesitantly because I think it's really a shame what is going on. On the one hand we have – I think everybody has joined in and desired [sic] to protect the ecology of the Lake Tahoe Basin. You know we all want to do the right thing. But what is right is another matter when you have a developer who's been sitting there for 18 years and has gotten all local approvals, permits, etc., and is basically caught up in a bureaucratic system which is really sad, but that does not influence my decision." CR 50:275

[21] It has been observed that the disposition of cases, particularly motions for summary judgment, is not furthered "by counsel being t personal vehicle by which 'undisputed' facts are put before the Court. consider it a tribute to the high calling of advocacy to say that we think an unnatural, if not virtually impossible, task for counsel, in his own ca to drop his garments of advocacy and take on the somber garb of objective factstater." *Inglett & Co. v. Everglades Fertilizer Co.*, 255 F. 342, 349 (5th Cir.1958); see also *Friedel v. Madison*, 832 F.2d 965 (7 Cir.1987); and see 28 *Fed.Proc.* L.Ed. § 62:597.

motion, submitted a 27-page detailed affidavit of Mr. Nat Sinclair, accompanied by 67 written exhibits. The verified Complaint also set forth detailed factual allegations.

A review of California's lengthy and detailed factual submission makes it clear that the California Attorney General took vigorous exception to many of the critical and material facts advanced by Lakeview, and that there were and remain significant disagreements as to material facts.[22] In spite of this contradictory evidence, and over Lakeview's strenuous protests, the District Court, in ruling on the motions for summary judgment, proceeded to make certain key factual determinations which it labeled "Conclusions of Law," including the finding that the Unit 2 portion of the project was independent from and not connected with contiguous parts of the development, and therefore Lakeview's construction of over 85% of the project "cannot provide a basis for a vested right" to complete the remainder of the project. Having made these "Conclusions of Law," the District Court held that it was bound by California law in determining Lakeview's vested rights claim. Based upon a wooden application of California precedents, the District Court found that, in the absence of actual building permits for the remaining townhouses, Lakeview had not established a vested right to complete those units.[23] The District Court also made several other

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[22] For example, Lakeview contends that the project has always been an interdependent, unitary PUD project, while California and TRPA contend that it somehow became transformed into three separate "projects" (Unit 1 townhouses, Unit 2 townhouses, and the Unit 2 hotel). Similarly, Lakeview vigorously denies, as TRPA/California contend, that it has ever abandoned or relinquished its right to develop the remaining 28 townhouses. Finally, whether Lakeview properly relied on TRPA's acquiescence in 1974-5 to the continued build-out of the project remains in serious dispute.

[23] The issuance of building permits is generally regarded as a "ministerial act." The City had routinely issued a variety of such permits for the project as and when requested by Lakeview, following perfunctory "plan checks."

key "Findings of Fact" in support of its grant of summary judgment, having weighed and considered the lengthy and conflicting affidavit evidence submitted by the parties. App. C, 33a-36a.[24]

Lakeview appealed to the Court of Appeals, where it strenuously argued that the District Court had erred in determining the vested rights claim on summary judgment, given the multitude of disputed, material factual issues. However, the Court of Appeals inexplicably avoided addressing this key issue, and instead, only further compounded the situation when it proceeded to make its own factual determinations and inferences from the record, necessarily stressing and

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[24] In announcing its ruling from the bench, the District Court said in pertinent part:

> "I do not feel it is proper for a Federal District Court sitting in Sacramento to make law for the State of California since itself [sic] has chosen not to do so.
>
> I will grant the motion for summary judgment on the issue of both common-law vested rights and/or statutory vested rights.
>
> I say somewhat hesitantly, to do so, not to be critical of counsel for the State, this has been a thorn because it has long been on the drawing board. There were a lot of representations that were made that would at least give a reasonable person more than a passing hint that they thought they had the green light to go ahead and develop.
>
> And the City of South Lake Tahoe was satisfied; the water quality control people were satisfied.
>
> * * *
>
> TRPA now basically runs the show. They have made different changes, made different requirements that cannot now be met or at least have not been met at this point in time. It is sad to say but Lakeview just happens to be caught in between the financial tug of war that is going on here. A tug of war between finances on the left and ecological considerations on the right." CR 86:22-23.

embellishing certain facts, and unfortunately, misstating or setting forth other "facts" that were simply not supported by the record.[25]

Thus, at the outset of its Opinion, the Court of Appeals stated that it was affirming the District Court's judgment, "albeit for reasons different than those stated by the district court." App. A, 2a. In examining the Opinion, it appears evident that the crucial factual determination upon which it was predicated was the Court's own inference, from meager evidence at best (see fn 11 above), that there was an expectation, or implied condition, at the time of the original approvals of the project, that the construction of the Unit 2 townhouses would be commenced within approximately six months after completion of the Unit 1 townhouses. While the District Court's January 12, 1989 Order contains numerous "Findings of Fact," certainly this was not one of them. Neither party ever suggested to the District Court that there was any factual support for such an implied condition.

The Court of Appeals also found it important that Lakeview did "virtually nothing to proceed with the development of Unit 2" between the completion of Unit 1 and the summer of 1981. App. A, 6a-7a. However the uncontested facts presented to the trial court are that the hotel was an integral component of the Unit 2 Final Map, that its construction was commenced in 1974, the next building season after the Unit 1 townhouses were completed, and that construction of the hotel continued nearly continuously until the early 1980s. The only thing that Lakeview did was to alter the *sequence* of construction – which it was free to do – proceeding with the construction of the hotel ahead of the remaining Unit 2 townhouses. Moreover, Lakeview's decision to proceed with the hotel before the remaining Unit 2 townhouses was implicitly accepted by the City when it issued the necessary building permits for the hotel, and by TRPA in its acquiescence in

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[25] It is noteworthy that the 49-page joint brief of TRPA and California contained a 23-page summary of the facts (as viewed from their perspective), and the argument to the Court of Appeals was almost exclusively factually oriented.

the construction and completion of the hotel and other improvements prior to its intervention in 1981.

Furthermore, the Court of Appeals' Opinion, while noting that "a rational trier of fact would be compelled to conclude that Lakeview did not proceed at a pace reasonably close to that anticipated" (App. A, 21a), nevertheless completely failed to address or consider the many factors well established in the record as to the *reasons* for those unexpected delays – the financial hardships experienced by Lakeview, the need for restructuring the ownership entities, the need to sell the partially-built hotel because of financial difficulties, and the delays attendant to CTRPA's intervention in the late 1970s. Surely, if it is a material consideration that construction did not proceed at "the pace originally anticipated", it must be equally material to consider the *reasons* for those delays.

REASONS FOR GRANTING THE PETITION

I. IN ITS HASTE TO DISPOSE OF THIS CASE, THE COURT OF APPEALS COMPLETELY ABROGATED ITS JUDICIAL RESPONSIBILITY, BY IGNORING BINDING PRECEDENTS AND AFFIRMING SUMMARY JUDGMENT IN THE FACE OF HOTLY CONTESTED, GENUINE AND MATERIAL FACTUAL ISSUES

It is, of course, well-settled that in ruling upon summary judgment, the court's task is to determine whether, viewing the evidence in a light most favorable to the non-moving party, there are any genuine issues of material fact, the materiality of which is based upon the correct application of the substantive law of the case. *Celotex v. Catrett*, 477 U.S. 317, 322 (1985); *Matsushita v. Zenith*, 475 U.S. 574, 585-586 (1986); and *Lujan v. National Wildlife Federation*, ___ U.S. ___, 110 S.Ct. 3177, 3186 (1990). A material fact is one whose existence might affect the outcome of the case. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 249 (1985). Additionally, whether or not the evidence is such that a reasonable jury could return a verdict for the non-moving party governs

whether or not the issue is "genuine," and all justifiable inferences are to be drawn in favor of the non-moving party. *Id.* at pp. 248, 255; *Matsushita, supra,* at p. 587. Thus, if any of the evidence submitted is competent to raise a genuine issue as to any material fact, the Court is without power to grant the motion. FRCP 56(c); *Lujan, supra* at 3186.

This Court has also repeatedly held that complex land use cases, involving as they most often do vigorously disputed factual and legal contentions, requires a full "ad hoc factual inquiry,"[26] and thus are particularly unsuited for summary judgment. However that is exactly what occurred here. A complex, fact-dependent and hotly disputed land use case, involving crucial determinations about key facts and the application of complex legal principles thereto, was resolved by summary judgment against the property owner at the trial court level, and then affirmed – albeit for different "factual" reasons – by the Court of Appeals, without that court even mentioning the propriety of doing so by summary judgment.

This case began as an action to determine whether Lakeview had *acquired* a legally-cognizable vested right in the first instance, which would have permitted Lakeview to complete the remaining five townhouse complexes free of TRPA's belated assertion of jurisdiction. The critical facts going to whether Lakeview had in fact *acquired* a vested right were weighed and evaluated by the District Court on summary judgment. In the Court of Appeals, Lakeview's primary efforts were directed at arguing why summary judgment was improper, considering the vigorously disputed factual evidence submitted only on affidavits, and the fact that the District Court had reached "Conclusions of Law" as to these

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[26] See e.g., *Keystone Bituminous Coal Assn. v. DeBenedictis,* 480 U.S. 470, 494-95 (1987); *Kaiser Aetna v. U.S.,* 444 U.S. 164, 175 (1979). See also, *Greene v. Town of Blooming Grove,* 879 F.2d 1061 (2nd Cir.1989), where the court held that it was a material issue of fact, thus making summary judgment improper, as to the nature and extent of the developer's vested right to complete a development project that was approved *26 years* prior to filing suit.

critical issues which were, in reality, thinly disguised determinations of disputed material facts.[27] For example, important material factual disputes continue to exist as to what constituted the "project" for purposes of the vested rights analysis – whether the project was a unitary, interdependent PUD or three separate, distinct projects; whether the governmental approvals received by Lakeview were in any way conditioned upon a required sequence of construction or time for completion; and whether Lakeview's reliance on TRPA's 11 years of acquiescence in the development of the project was justified under the circumstances. Any of these issues could have affected the outcome of this case.

By sweeping all that aside, the Court of Appeals only further compounded the situation. Not only did it avoid addressing in any manner the arguments or legal precedents advanced by Lakeview to attack the propriety of resolving the case on summary judgment, but it then proceeded to make its own crucial factual determination, without any citation to the record, upon which it then fashioned and articulated an entirely novel principle of law – that a legally-protected, vested property right may nevertheless "evaporate" if the developer is delayed unexpectedly in completing its development project.

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[27] Lakeview also pointed to other decisions involving similar factual situations, where the courts made it crystal clear that these very issues were in fact *factual* determinations not proper to resolve on summary judgment. For example, in *Sierra Club v. California Coastal Conservation Commission*, 58 Cal.App.3d 149 (1976), the court, in upholding a determination that a vested right had been established in a similar, multi-component project, held in pertinent part:

> "Whether the buildings within the development which were authorized by the building permit, but upon which no actual construction has commenced, were so interdependent with those buildings within the development which were constructed by February 1, 1973 that the actual construction was sufficient to also exempt the authorized but as yet unconstructed buildings, is initially a question of fact. [citation]" *Id.*, at 157.

Even if one accepts the Court of Appeals' premise that, in weighing the vested rights claim, it was necessary to look at whether or not the project proceeded at the pace which was originally contemplated – an issue that was neither briefed nor addressed by the parties – it would appear to be unavoidable also to require examination of the *reasons* for any delay. Otherwise, how could it be determined that the pace at which the project actually proceeded was not in fact "reasonable" under all the circumstances? Thus, even using the Court of Appeals' newly-fashioned vested rights rule, it follows that it was certainly necessary for the Court to have weighed a wide range of disputed, material factual contentions which clearly make its resolution of this case on summary judgment improper.[28]

In brief, this case vividly demonstrates why an appellate court should not attempt to resolve on summary judgment a highly factually-dependent land use case, arising out of a project which evolved over many years, without the benefit of a full determination by the trier of fact as to all the disputed material factual issues involved. Where, as here, the appellate court must rely only on the briefs of the parties and its own scrutiny of often conflicting documents and affidavits submitted to the trial court, and where, as here, the moving parties' affidavits were prepared and submitted only by its trial counsel, it is no wonder that an appellate court may be led astray and reach conclusions which are simply not supported by the record.[29]

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[28] Fairness also suggests that if delay alone is a material fact to be considered in determining whether a landowner's "vested right" has been waived or "evaporated" due to passage of time, then the inexplicable 11-year delay by TRPA in asserting its regulatory jurisdiction, and its earlier affirmative acquiescence in the construction of the project, must also be a material fact warranting equal consideration. See e.g., *Monterey Sand Co. v. California Coastal Commission*, 191 Cal.App.3d 169, 176-179 (1987).

[29] It should be no surprise that we have been unable to locate a single California appellate case where a similar vested rights claim was

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II. THE COURT OF APPEALS, HAVING ASSUMED FOR ITS ANALYSIS THAT LAKEVIEW HAD MET THE REQUIREMENTS FOR ACQUIRING A VESTED RIGHT IN THE FIRST INSTANCE, THEN FAILED TO CONSIDER OR APPLY WELL-ESTABLISHED LAW THAT SUCH A VESTED RIGHT CANNOT BE LOST BY MERE UNFORESEEN DELAYS IN COMPLETION OF CONSTRUCTION.

A. Equitable Estoppel Principles Apply to Determine If Vested Rights Are Legally Acquired – Constitutional Protections Apply Once a Vested Right Has Been Acquired.

At the outset of its Opinion, the Court of Appeals addressed the issue of the proper law – federal or California – to be applied in addressing Lakeview's vested rights claim, keeping in mind that it was TRPA, a separate entity created by bi-state compact, that was asserting regulatory jurisdiction. Having concluded that "vested

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determined by summary judgment. For that matter, none of the California "vested rights cases" cited in any of the parties' briefs, including the following, were decided on summary judgment: *Russ Building Partnership v. City and County of San Francisco*, 44 Cal.3d 839 (1988); *Avco Community Developers, Inc. v. South Coast Regional Comm., supra* at 790; *Del Mar v. California Coastal Comm.*, 152 Cal.App. 3d 49 (1984); *South Central Coast Regional Comm. v. Pratt Construction Co., Inc.*, 128 Cal.App.3d 830 (1982); *McCarthy v. CTRPA*, 129 Cal.App.3d 222 (1982); *Court House Plaza Co. v. City of Palo Alto*, 117 Cal.App.3d 871 (1981); *Billings v. California Coastal Comm.*, 103 Cal.App.3d 729 (1980); *Pardee Construction Co. v. California Coastal Comm.*, 95 Cal.App.3d 471 (1979); *Tosh v. California Coastal Comm.*, 99 Cal.App.3d 388 (1979); *Oceanic California, Inc. v. North Central Coast Regional Comm.*, 63 Cal.App.3d 57 (1976); *Patterson v. Central Coast Regional Comm.*, 58 Cal.App.3d 833 (1976); *Aires Dev. Co. v. California Coastal Zone Conservation Comm.*, 48 Cal.App.3d 534 (1975); *Environmental Coalition of Orange County, Inc. v. Avco Community Developers, Inc.*, 40 Cal.App.3d 513 (1974); *Spindler Reality Corp. v. Monning*, 243 Cal.App.2d 255 (1966); *Anderson v. City Council*, 229 Cal.App.2d 79 (1964).

rights" are a "species of governmental estoppel" (App. A, 11a), and "no federal constitutional or statutory law requires the states to recognize *any* doctrine of governmental estoppel, . . . we must reject Lakeview's suggestion that federal law governs the issue of vested rights." App. A, 12a. The Court of Appeals then concluded it should apply California law to the issues at hand, and proceeded to address the leading California case on vested rights, *Avco Community Developers v. South Coast Regional Comm.*, 17 Cal.3d 785 (1976) (hereafter "*Avco*").

In applying the principles set forth in *Avco* to the facts of this case, and assuming for its analysis that Lakeview had met the necessary requirements under *Avco* to *acquire* a vested right, the Court then reasoned that for Lakeview to argue it had a right to complete its project,

> "[I]s for it to argue in effect that its right to develop Unit Two is vested forever. Yet, such a permanent vesting is the evil that the *Avco* court said it would not tolerate. . . . When, as in this case, the government does not interfere until well after the time the developer could have completed the entire project, the reason for recognizing a vested right evaporates." App. A, 20a.

Although it is true that in evaluating whether a vested right had been *acquired* in the first instance, Justice Mosk found that mere "construction of subdivision improvements or the zoning of land for a planned community" are not sufficient to *create* a vested right (*Avco*, at 797-8), nevertheless the *Avco* court also made it abundantly clear that if more than mere zoning and initial subdivision improvements were involved – such as substantial construction undertaken in reliance on all final discretionary approvals, as was done here – then the landowner would in fact be deemed to have "secured a vested right [and] the government may not, by virtue of a change in the zoning laws, prohibit construction authorized by the permit upon which he relied." *Id.* at 791.

The difficulty with the Court of Appeals' analysis in the instant case, however, aside from its narrow interpretation of California law, is that it has confused the legal principles of estoppel applicable to the initial *acquisition* of a vested right with the constitutional principles applicable to the *lapse* or *loss* of a

vested right once established – rights the courts have clearly held are property rights. Nowhere in the Court of Appeals' decision is there any recognition of this crucial distinction, nor of the established principle of law that once a legally-protected "vested *property* right" has been acquired, it cannot thereafter be lost or taken without due process of law and/or just compensation, as mandated by the Constitution.

At least since the turn of the century, this Court has recognized that work performed pursuant to governmental approvals may give rise to property rights deserving of constitutional protection:

> "Being the owner of the land and having partially erected the works, the plaintiff in error had acquired property rights and was entitled to protection against unconstitutional encroachments which would have the effect to deprive her of her property without due process of law." *Dobbins v. City of Los Angeles*, 195 U.S. 223, 239 (1904).[30]

That "vested rights" are "property rights" which are firmly rooted in the Constitution is also well-settled in California, the state law which the Court of Appeals chose to apply. Thus, most recently, the California Supreme Court restated the established rule as follows:

> "Once a landowner has secured a vested right the government may not, by virtue of a change in zoning laws, prohibit construction authorized by the permit upon which he relied. [citation] The rule is grounded upon the constitutional principle that property may not be taken without due process of law. [citation] The vested rights doctrine protects the developer's right not

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[30] See also, *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979), where this Court stated, "While the consent of individual officials representing the United States cannot 'estop' the United States [citations], it can lead to the fruition of a number of expectancies embodied in the concept of 'property' – expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property."

> only to construct, but also to use the premises as authorized by the permit." *Russ Bldg. Partnership v. City and County of San Francisco*, 44 Cal.3d 839, 846 (1988).[31]

Having established that a vested right is a property right, it necessarily follows that the exercise of the police power by a governmental agency which operates to revoke or impair that property right can constitute a taking for purposes of the Just Compensation Clause.[32]

The distinction between the equitable estoppel principles applicable to determining whether a vested right is *acquired* in the first instance, from the constitutional protections extended to a vested right *once obtained*, has also been repeatedly articulated by the California appellate courts:

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[31] See also, *Miller v. McKenna*, 23 Cal.2d 774, 783 (1944), where the California Supreme Court stated, "[A] vested right, as that term is used in relation to constitutional guaranties, implies an interest which it is proper for the state to recognize and protect, and of which the individual may not be deprived arbitrarily and without injustice." (citing *Campbell v. Holt*, 115 U.S. 620 (1885)); accord, *Halaco Engineering Co. v. So. Central Coast Regional Comm.*, 42 Cal.3d 52, 72-73 (1986); *Urban Renewal Agency v. Coastal Comm.*, 15 Cal.3d 577, 583-84 (1975); *Stanson v. San Diego Coast Regional Comm.*, 101 Cal.App.3d 38, 49 (1980); *Sierra Club v. California Coastal Zone Conservation Comm.*, 58 Cal.App.3d 149, 156-58 (1976); *Transcentury Properties, Inc. v. State of California*, 41 Cal.App.3d 835, 844 (1974); *Monterey Sand Co., supra*, 191 Cal.App.3d 169.

[32] See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) (police power exercise can give rise to taking of private property); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 130-31 (1978) (police power that results in a "physical invasion" may constitute a taking); *Miller v. Schoene*, 276 U.S. 272, 279 (1928) (destruction of private property, absent a clear need to protect health, safety and welfare may constitute a taking); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (exercise of police power that goes "too far" may constitute a taking); *Dainese v. Cooke*, 91 U.S. 580, 583-84 (1875) (exercise of police power that revokes previously issued authorization to build effects a taking).

> "Once a right has vested, its impairment or destruction must comport with constitutional principles. However, acquisition of the right is grounded on equitable principles of estoppel." *Aries Dev. Co. v. California Coastal Zone Conservation Comm.*, 48 Cal.App.3d 534, 548 (1975).

This same principle was further elaborated upon in *Pardee Construction Co. v. California Coastal Comm.*, 95 Cal.App.3d 471 (1979). There, the court again noted at p. 480 that,

> "[T]he entire discussion of the *Avco* case is directed toward the issue of *acquisition* of a vested right, and not to events which may lead to loss of a vested right." [emphasis in original]

The court went on to hold at pp. 479-80:

> "The [vested] right possessed by Pardee was in the nature of a property right. Such a right is rooted in the Constitution. [citing *Miller v. McKenna*, 23 Cal.2d 774, 783 (1944).] Pardee's failure to exercise that vested right to its fullest extent before the enactment of the 1976 coastal act does not affect its *vested* character.
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> * * *
>
> If the Legislature is without authority to retroactively deprive Pardee of a vested right, *a fortiori* the State Commission, by its regulation, was without authority to do so." [emphasis in original]

B. A Vested Right, Once Obtained, May Not be Lost or "Evaporate" Simply Due to Delays in Completion of the Development Project Which Resulted From Governmental Intervention, Litigation, And A Changed Economic Landscape, All of Which Were Beyond the Property Owner's Ability To Control.

In *Dobbins v. City of Los Angeles*, 195 U.S. 223, 237 (1904), this Court stated:

> "No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, whatever may the source from which the power to pass such enactment may have been derived."

No reported case of which we are aware has ever held that a vested right, once properly obtained, can be lost simply due to the passage

of time. A property right simply cannot be so cavalierly dispensed with:

> "The Legislature may not enact curative legislation the effect of which would be to destroy or unlawfully infringe upon vested rights.
>
> * * *
>
> The right of 'acquiring, possessing, and protecting property' is anchored in the first section of the first article of our Constitution. This right is as old as [sic] Magna Charta. It lies at the foundation of our constitutional government, and 'is necessary to the existence of civil liberty and free institutions.' " *Miller v. McKenna, supra,* at 782, 783, quoting *Billings v. Hall,* 7 Cal. 1, 6 (1857).

Having assumed for purposes of its analysis that Lakeview had in fact acquired a legally-cognizable vested right in the first instance, the Court of Appeals was not then free to fashion a new doctrine of law, unguided by any legal precedents, that such a vested property right could be lost, or "evaporate," merely due to unexpected delays in completing the development project.[33]

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[33] The recognition that modern land development projects often take many years of planning and construction to bring to fruition, and often require compliance with a multitude of governmental approvals prior to the application for building permits has led many jurisdictions to find that the property owner acquired a vested right to complete the work of development long before the commencement of actual construction. See e.g., *City of West Hollywood v. Beverly Towers Inc.,* 52 Cal.3d 1184 (1991) (right to complete condominium conversion found to be vested despite the fact that the subdivision had not yet legally come into existence because no units had been sold); *Board of County Commissioners v. Lutz,* 314 So.2d 815, 816 (Fla.App.1980) (vested rights found in County's approval of a large-scale planned unit development project); *Hollywood Beach Hotel Co. v. City of S. Hollywood,* 329 So.2d 10 (Fla.1976) (finding a vested right based on good faith reliance on rezoning to permit multiple use); *Mayor and City Council of Baltimore v. Crane,* 352 A.2d 786 (Md.1976) (vested right to complete proposed development based on conveyance of property to city for highway purposes); *Board of Supervisors v. Medical Structures, Inc.,* 292 S.E.2d

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In *Pardee, supra,* at 475, the leading California authority on this point, the court was faced with the issue of whether Pardee's "vested rights exemption" from later Coastal Commission control was lost as to the remaining, unconstructed 79 units of its original project, in view of the fact that Pardee had allowed its local building permits to expire due to marketing considerations. Subsequently, when Pardee attempted to resume construction, the State Coastal Commission refused to honor its prior "vested rights exemption." The court noted:

> "Cases relied upon by the State Commission do not grapple with this precise issue nesting at the heart of their assertion. For example, *[Avco]* and *Oceanic California, Inc., v. North Central Coast Regional Com., supra,* 63 Cal.App.3d 57, held a building permit was necessary to *acquire* a vested right. Both cases dealt with developers who never obtained a vested right to even start construction on their projects because they never obtained building permits." *Id.* at 480.

But the *Pardee* court made the following important distinction:

> "These are two distinct issues; one deals with the point at which the vested right is obtained and that point of beginning is the acquisition of the building permit. The second concerns the extent of the vested rights exemption once it is obtained." *Id.* at 481.

The court then addressed whether Pardee's delay in fully exercising its vested right constituted an abandonment or relinquishment of that right. The court held:

> "The trial court found as a matter of fact no abandonment or relinquishment by Pardee of its vested right. Where a developer allows a permit to lapse for lack of activity, such fact is but some *evidence* bearing on the

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799, 801 (Va.1972) (vested right found in site plan approval, because "the site plan has virtually replaced the building permit as the most vital document in the development process"); *Juanita Bay Valley Community Ass'n. v. City of Kirkland,* 510 P.2d 1140, 1155 (Wash.App.1973) (vested right found in grading permit approval); *Board of Supervisors v. Cities Service Oil Co.,* 193 S.E.2d 1 (Va.1972) (finding a vested right in a site plan approval).

> issue of abandonment or waiver of a vested right. [citation] It at best could create a conflict resolved by the trial court's finding. Here substantial evidence supports the trial court finding on each of these factual issues. Therefore, we conclude (1) the State commission regulations [citations] are unenforceable as to Pardee; (2) the vested right possessed by Pardee here could not be retroactively destroyed as a matter of law; and (3) there exists no factual basis to hold that Pardee as a matter of fact abandoned or waived that right to complete the remaining 79 units." *Id.* at 481-82.[34] [emphasis in original]

If *Pardee* did not lose its vested rights under California law by allowing its underlying permits to expire, *a fortiori* Lakeview's mere delay in completing construction under permits which had *not* expired, and which contained no such expiration deadline, surely cannot operate to deprive it of its vested rights.[35]

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[34] Whether there has been an abandonment of a property right requires a showing, not only of an intent to abandon, but also of some affirmative act on the part of the owner clearly manifesting an intent to abandon that interest. See, *Putnam Armonk, Inc. v. Town of Southeast*, 382 N.Y.S.2d 538, 542 (NY 1976); Anderson, American Law of Zoning (3d ed, 1986) § 6.65, p. 127.

[35] See also, *Mayor and City Council of Baltimore v. Crane*, 352 A.2d 786, 792 (Md. 1976), where the Maryland Supreme Court, after finding that the plaintiff had acquired a vested right, then addressed whether the right was lost due to passage of time. The court stated: "While they may not have acquired a right in perpetuity, they certainly had a right the life of which was only limited by reasonableness [citation], a right which was neither extinguished nor attenuated by a lapse of *nine years*, primarily because from 1964 until at least 1971, the Cranes had no reason to suppose that their right was at hazard" [emphasis added]. Similarly, in *Putnam Armonk, Inc. v. Town of Southeast*, 382 N.Y.S.2d 538 (NY 1976), the court held that the property owner had acquired a vested right to build the entire project, consisting of 500 homes on 1/4-acre lots, despite a complete cessation of construction activity for *over 15 years*. Also see, *Community Develop. Comm. v. City of Fort Bragg*, 204 Cal.App.3d 1124, 1129-31 (1988) holding that, even

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CONCLUSION

The essence of the decisions below is that Lakeview lost is rights to complete the remainder of its PUD project, and thus its opportunity to recoup its substantial investment in the property, simply because, due to governmental interference, the vicissitudes of the marketplace, and unexpected financial difficulties, it was unable simultaneously to work on all aspects of the project at the same time. The effect of the Court of Appeals' decision is to disembowel the law of vested rights and to leave a scar on the ground at Lake Tahoe. The economic waste that occurs when a project is halted after millions of dollars are expended toward its completion is of no benefit to either the public or the landowner. Moreover the deprivation of substantial property rights deserves to be justified by more than mere public convenience or whimsy. Accordingly, review by this Court is essential to set the principles of vested rights back on course, to clarify this increasingly important and active area of land use jurisprudence, and to redress the substantial injury that has been inflicted on Lakeview in the wake of the decisions below.

Respectfully submitted,

LAWRENCE L. HOFFMAN
Counsel of Record
JAMES K. BURAU
PATRICIA L. JOHNSON
HOFFMAN, LIEN & FACCINTO
3000 North Lake Boulevard
Post Office Box 7740
Tahoe City, California 95730
(916) 583-8542

Counsel for Petitioner

April 17, 1991

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under California law, a developer's use permit did not expire, in spite of its failure to commence construction within one year as provided in the permit, where the Court found such a requirement unreasonable in view of the developer's good faith efforts to pursue construction.

APPENDICES

APPENDIX A

LAKEVIEW DEVELOPMENT CORPORATION,
a California corporation, Plaintiff-Appellant,

v.

CITY OF SOUTH LAKE TAHOE, a municipal corporation; Tahoe Regional Planning Agency, a separate legal entity created pursuant to an interstate Compact between the States of Nevada and California, and Does 1 through 30, Defendants-Appellees.

No. 89-15214
United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 18, 1990
Decided Sept. 28, 1990

Lawrence L. Hoffman, Hoffman, Lien & Faccinto, Tahoe City, Cal., for plaintiff-appellant.

Gary A. Owen, Crowell, Susich, Owen & Tackes, Carson City, Nev., Richard M. Skinner, Deputy Atty. Gen., Sacramento, Cal., for defendants-appellees.

Appeal from the United States District Court for the Eastern District of California.

Before LIVELY,* FLETCHER and REINHARDT, Circuit Judges.

FLETCHER, Circuit Judge:

Plaintiff Lakeview Development Corporation (Lakeview) appeals from the district court's entry of judgment against it on four claims, the first of which asks for a declaration that Lakeview has a "vested right" to complete the construction of a townhouse development, and the other three of which ask for injunctive relief and

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* Honorable Pierce Lively, Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

damages to redress the alleged deprivation of Lakeview's right to the economically viable use of its land. We affirm the district court's judgment on all four claims, albeit for reasons different from those stated by the district court.

I.

FACTS

In 1967, Lakeview[1] bought a four acre plot of land in South Lake Tahoe, intending to build a "planned unit development" consisting of townhouses and a hotel.

In October of 1968, Lakeview submitted an application to the City of South Lake Tahoe (City) for a special use permit (SUP). The application included a proposed subdivision map and a proposed site plan which depicted the layout of nine structures to be built on the site – eight townhouse buildings containing between two and six units each (a total of forty-two units) and one hotel containing 158 rooms. The map reflected that there were to be two clusters of townhouses, designated Unit One and Unit Two, containing eighteen and twenty-four units respectively. A swimming pool and a recreation area were also depicted. Also submitted were maps depicting among other things elevations of the buildings, floor plans, and common road and drainage facilities.

On November 27, 1968, the City Planning Commission approved the special use permit subject to four

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[1] Although the entity that is now Lakeview has had several different names, for convenience, we refer to it as Lakeview.

conditions and the tentative map subject to thirteen conditions. One of the four conditions of the SUP was, "All buildings, tree removal, and landscaping to be as approved by Architectural Review Committee . . . such approval to be obtained prior to issuance of any individual permit for construction."

On December 3, 1968, the City Council approved the tentative map subject to same conditions as imposed by the City Planning Commission.

The minutes of the May, 1969 City Planning Commission meeting show that development of the townhouses was intended at that time to take place in two phases; the first was to include the fourteen townhouses designated "Unit One" and the second was to include the twenty-eight townhouses designated "Unit Two." There was to be a three to six month span of time between the completion of phase one and the commencement of phase two.

On June 18, 1969 the newly-created California Tahoe Regional Planning Agency (CTRPA) approved the plan subject to the same conditions as those imposed by the City. (Appellee Tahoe Regional Planning Agency (TRPA), created by an interstate compact approved by Congress, P.L. 91-148, 83 Stat. 360, was still being formed and had not yet come into official existence. It began operations on March 19, 1970.) On November 7, 1969, the final map for Unit One was recorded. On November 17, 1970, the final map for Unit Two was recorded.

Between November of 1969 and November of 1971, Lakeview obtained building permits from the city as each Unit One structure, including the swimming pool and recreation pavilion, was built.

Almost two years later, in October of 1973, Lakeview obtained a foundation permit for the first sixplex in Unit Two. Shortly thereafter, however, it abandoned the permit and changed its construction plans. Lakeview decided to delay building Unit Two and to proceed with the development of the hotel. Nat Sinclair, one of Lakeview's principals, stated in his affidavit that he made the decision because of a "hostile regulatory environment." In other words, it was becoming clear that the California legislature was on the verge of giving CTRPA a broader mandate to control development than it had previously.[2] Sinclair felt that the hotel was more important to develop and that the sooner the construction was begun on the hotel, the greater the protection Lakeview would have against changes in the law.

Lakeview attempted to obtain a building permit for the hotel before July 12, 1974, the date CTRPA was expected to announce its new plan. Lakeview failed to do so, but it began to lay a foundation anyway – apparently on assurances that the City would later ratify the work done.

On July 12, 1974, CTRPA announced an interim plan, Resolution 74-1. That plan stated that CTRPA would review all permits for certain buildings "granted [by local governments] since January 1972 for which actual construction has not commenced. For purposes of this section, construction shall constitute issuance of a building permit and completion of a foundation." On July 24, 1974, the City granted Lakeview the foundation permit for the

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[2] *See* Cal.Govt.Code § 67041.

hotel. On July 28, Gordon Hooper of CTRPA wrote to the City Manager, stating his intention to have a "stop work" order issued because CTRPA had not reviewed the project. The City Manager wrote back, asserting that CTRPA *had* reviewed – and approved – the hotel project in 1969. CTRPA took no further action.

During the same week in July when Lakeview's foundation permit application was pending before the City, TRPA, independently of CTRPA, expressed in a letter to the City its opinion that the permit should not be granted. TRPA, it should be recalled, did not exist when the special use permit was obtained in 1969. When TRPA began operations, it passed an ordinance requiring all developers to obtain administrative permits from TRPA before building. Section 9.11 of that ordinance, subsequently renumbered as § 9.10, contained a grandfather clause exempting certain developments from the administrative permit requirement. The clause provided:

> Uses of land . . . that do not conform to the regulations established by this Ordinance and . . . which are to be created in connection with a subdivision the final map of which was approved by the appropriate local government . . . within five years prior to February 10, 1972 are non-conforming uses [that may be continued], *provided, however,* in the case of a . . . use to be created, it shall occupy no greater area than planned at the time such subdivision was approved. If any such use ceases for a period of one year, subsequent use of such land shall be in conformity with the regulations contained in this Ordinance.

The City responded to TRPA's letter with its own letter stating that it intended to issue the foundation

permit. The City's letter, without specifically referring to the grandfather clause, pointed out to TRPA that a series of approvals were obtained by Lakeview "prior to the initiation of regulatory measures" by TRPA and that pursuant to such approvals, "work was begun on the project." The City seemed to be referring to the work done on Unit One, but the reference is not entirely clear. In any event, the City's letter to TRPA, like its letter to CTRPA, proved effective. TRPA did not pursue its objection to the hotel construction. The parties speculate that TRPA did not pursue its objection because of the grandfather clause. That, however, is not entirely clear. TRPA may simply have chosen not to fight a particular battle notwithstanding the fact that it felt the hotel was not grandfathered.

Because of problems with financing, the hotel project proceeded exceedingly slowly. Several years after construction began, only about a quarter of the structure was built. In 1979, Lakeview sold the hotel to another group, and that group eventually finished building it, but only after protracted litigation with CTRPA, which commenced in 1982. That litigation ultimately ended in a settlement, under which both parties (neither of them parties to this lawsuit) agreed that the result would not prejudice them in other cases.

In 1980, TRPA was reconstituted pursuant to extensive amendments to the Interstate Compact. See P.L. 96-551, 95 Stat. 3233; Cal.Govt.Code § 68000 *et seq.*; Nevada R.S. § 277.190 *et seq.*

Between May, 1974 and the summer of 1981, Lakeview had done virtually nothing to proceed with the

development of Unit Two. In the summer of 1981, Lakeview contacted City officials about obtaining building permits for Unit Two. The City said that it was willing to grant the permits, but only with the consent of TRPA. The City noted that one condition of its own still had to be met – architectural review approval. In September of 1981, a TRPA attorney wrote Lakeview's lawyer that his client should seek a vested rights ruling from TRPA to determine if Lakeview was entitled to build Unit Two. Without such a determination, TRPA would not allow Unit Two to be built absent its further review of the project.

More than two years passed, and no administrative proceeding was brought to determine vested rights. On May 1, 1984, TRPA became subject to a temporary restraining order (TRO), which on August 9 became an injunction, prohibiting it from approving *any* developments, except in "circumstances of imminent threat to public health, safety, and welfare." The appellees do not raise a claim of laches with regard to Lakeview's failure to seek a vested rights determination prior to May 1, 1984.

This lawsuit was filed on July 12, 1985. The appellees concede that during the period of the TRO and injunction (May 1, 1984 to July 15, 1987), an attempt by Lakeview to exhaust its vested rights remedies by applying to TRPA would have been futile. They concede as well that under TRPA's new post-injunction plan, there is no possibility that TRPA could review its vested rights claim.

Lakeview's first claim asks for a declaratory judgment that it has a vested right to develop Unit Two

without further intervention by TRPA. Its second claim asks for an injunction preventing TRPA from imposing its land use restrictions on the land planned for Unit Two, because such imposition would deprive it of all economically viable use of its land in violation of the fifth and fourteenth amendments to the United States Constitution. The third claim asks for damages resulting from the taking of all economically viable use of the land without just compensation. The fourth claim is essentially the same as the third, except that it seeks damages under 42 U.S.C. § 1983 for a deprivation of property without due process.

The district court decided the first two claims against Lakeview on summary judgment and the last two on a motion to dismiss pursuant to *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353 (9th Cir.1977). Lakeview appeals all four adverse determinations.

II.

DISCUSSION

A. *The Vested Rights Claim*

A number of cases in California[3] and in other jurisdictions[4] hold that if a government agency grants a real estate developer formal permission to build a particular project and the developer incurs certain kinds of

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[3] *See, e.g., Avco Community Developers, Inc. v. South Coast Regional Commission*, 17 Cal.3d 785, 132 Cal.Rptr. 386, 553 P.2d 546 (1976).

[4] *See* 49 A.L.R.3d 13 (1973).

expenses in reliance on that permission, the developer may acquire a "vested right" to complete the project as approved – even if the completed project would violate more stringent land use laws passed since the time permission was granted. This case raises the questions of what kind of formal government permission suffices to meet the first requirement of a "vested right" and what the scope of such a right is assuming it attaches. Before we analyze these questions, we first consider whether state or federal law governs.

Lakeview argues that the question whether it has a "vested right" to complete its project is a question of federal law and that this court may therefore ignore state court decisions to the extent it finds their reasoning unpersuasive. It argues first that because the vested rights doctrine limits the state's power to interfere with property rights, the doctrine has federal Constitutional implications and requires federal courts to fashion their own rules. Lakeview argues second that even if its vested rights claim does not implicate the Constitution, it implicates the Interstate Compact between California and Nevada and that therefore this court may create federal common law to decide the claim. Both arguments lack merit.

Lakeview acknowledges that the "vested rights" doctrine traditionally has been treated as a doctrine of state law and that the doctrine has evolved in the state courts. Nonetheless, Lakeview argues that the case of *Nollan v. California Coastal Commission*, 483 U.S. 825, 833-34 n. 2, 107 S.Ct. 3141, 3146 n. 2, 97 L.Ed.2d 677 (1987), changed the framework for analyzing the issue, and that in the wake of Nollan, we may depart from the California cases.

Lakeview relies in particular on footnote 2 of *Nollan*, where the Court, in responding to Justice Brennan's dissent, said that "the right to build on one's own property – even though its exercise can be subject to legitimate permitting requirements – cannot remotely be described as a 'government benefit.' " Lakeview argues that the reference to building on one's property as a "right" and not a "benefit" is somehow inconsistent with the doctrine that a "right" to build a *particular project* vests only after substantial work is performed in reliance on a government permit.

There are two difficulties with this argument. First, the *Nollan* case dealt only with a property owner's right to build a single-family house, traditionally among the most minimally-regulated uses.[5] Second, and more important, the *Nollan* court's reference to a landowner's abstract "right" to build in no way suggests that a landowner has an unconditional right under the taking or deprivation clauses[6] of the federal Constitution to build any particular project he chooses. The sentence quoted from the *Nollan* footnote is qualified by its reference to "legitimate permitting requirements." The footnote does not imply that a permitting requirement is "illegitimate" simply because it disallows a previously permitted use. It is well established that there is no federal Constitutional

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[5] *See* Cunningham and Kremer, *Vested Rights Estoppel, and the Land Development Process*, 29 Hastings L.J. 625, 636 & nn. 42-43 (1978).

[6] The fifth amendment to the United States Constitution provides in relevant part: "No person shall be . . . deprived of . . . property without due process of law; nor shall private property be taken for public use, without just compensation."

right to be free from changes in land use laws. *See, e.g., Haas v. City and County of San Francisco,* 605 F.2d 1117, 1120 (9th Cir.1979); *Traweek v. City and County of San Francisco,* 659 F.Supp. 1012, 1026 (N.D.Cal.1984) ("[P]laintiffs bought into a heavily regulated situation and were on notice that . . . [t]heir purchase of property . . . was therefore necessarily 'subject to further legislation upon the same topic.' *Veix v. Sixth Ward Building and Loan Association,* 310 U.S. 32, 38, 60 S.Ct. 792, 795, 84 L.Ed. 1061 (1940)"). A claim brought under the federal Constitution charging the taking or deprivation of property thus cannot be premised solely on the charge that the government has repealed a law and revoked a once valid permit.

In contrast to a taking or deprivation claim, the gravamen of a "vested rights" claim is that the landowner has a right to a particular use of his land because he has relied to his detriment on a formal government promise (in the form of a permit) stating that he can develop that use. The claim is thus a species of governmental estoppel. *Raley v. California Tahoe Regional Planning Agency,* 68 Cal.App.3d 965, 985, 137 Cal.Rptr. 699, 712 (1971). A claim of estoppel against the government rests not on Constitutional norms of fairness but on broader norms of equity. *Id.; see also Watkins v. United States Army,* 875 F.2d 699, 706 (9th Cir.1989) (en banc) *petition for cert. filed,* 58 U.S.L.W. 3771 (U.S. May 21, 1990) (No. 89-1806), (equitable estoppel against the government is a "nonconstitutional ground" for relief). Since no federal constitutional or statutory law requires the states to recognize any doctrine of governmental estoppel, let alone a doctrine with the particular contours that Lakeview urges us to

recognize, we must reject Lakeview's suggestion that federal law governs the issue of vested rights.

Lakeview argues that even if federal law does not generally govern the question of vested rights, federal law nonetheless applies in this case because the case arises under the Interstate Compact between Nevada and California. In *California Tahoe Regional Planning Agency v. Jennings*, 594 F.2d 181, 190 (9th Cir.1979), we held that by approving the Compact, "Congress did no more than incorporate the agreement of the two parties into the body of federal law; it did not make applicable the entire panoply of federal administrative and substantive standards." We therefore must look to the laws of Nevada and California to resolve the question before us. If there were a conflict between California and Nevada law on the question of vested rights, this case would be more difficult. We would have to decide whether to apply the law of the jurisdiction where the land is situated and the permit was granted or whether to apply some other principle to resolve the conflict. But there is no conflict here. Nevada follows California law on vested rights. *See Kings Castle v. Washoe County Bd. of Com'rs*, 88 Nev. 557, 502 P.2d 103 (1972). We therefore apply state law to Lakeview's claim.

The seminal case on vested rights is *Avco Community Developers, Inc. v. South Coast Regional Commission*, 17 Cal.3d 785, 132 Cal.Rptr. 386, 553 P.2d 546 (1976) (Mosk, J.). In *Avco*, a large real estate developer, plaintiff Avco, had submitted a subdivision map to the county setting forth a plan for a certain 74-acre parcel. The map indicated that the 74 acres would be divided into 27 parcels and that multi-residential structures would be built on

those parcels. The county approved the map and a rough grading permit, which did not refer to grading for any specific building site. Avco, pursuant to the county permits, built storm drains, culverts, street improvements, utilities and similar facilities. After the developer had spent over two million dollars on these improvements, California passed a major reform of zoning laws for lands in the coastal zone. The new law required approval from the Coastal Commission for certain projects, such as Avco's. Avco contested the application of the new law to its project, claiming it had a vested right to complete the project. The court denied Avco's claim.

The court stated the general rule as follows: "[I]f a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit." 132 Cal.Rptr. at 389, 553 P.2d at 549. In *Avco*, the court addressed the question of what qualified as a "permit"[7] for the purposes of this rule, and in so

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[7] In the course of a development project, a builder must often obtain several different kinds of permits from the government; the larger and more complex the project, the more approvals are required. Developments involving more than one structure, such as the ones at issue both in Avco and in this case, require the developer to submit progressively more specific maps and plans for government approval. The application for a building permit is the last and most specific item the developer must submit for approval before commencing construction on a particular building. The building permit application includes detailed construction plans that are reviewed to ensure compliance with, among other things, building safety

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doing addressed as well the general principles that inform [sic] the vested rights doctrine.

Prior to the *Avco* decision, California's lower courts had held that to obtain a vested right to complete the construction of a particular project, the landowner had to obtain a "building permit." *See Avco*, 17 Cal.3d at 792-93, 132 Cal.Rptr. at 390-91, 553 P.2d at 550-51 (discussing the rule of *Spindler Realty Co. v. Manning*, 243 Cal.App.2d 255, 53 Cal.Rptr. 7 (1966)). In *Avco*, the developer argued that the building permit rule should not apply to larger development projects when the developer has subdivided the land and installed subdivision improvements pursuant to governmental authorization. It pointed out that the building permit is issued late in the development process, often after the developer has performed a great deal of work on the land in reliance on more preliminary approvals. To allow the government to reverse itself at that late a point, argued the developer, would lead to the waste of resources on uncompleted projects and an unnecessary increase in the costs of building housing due to the excessive risks involved.[8]

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codes. Since each structure in a large development project may be different, each requires its own set of construction plans and its own building permit. The normal practice of developers is to apply for each building permit just before beginning the construction of the particular building to which the permit applies, since building permits are valid only for a relatively short time.

[8] For an elaboration on this argument, *see generally* Cunningham and Kremer, *Vested Rights*, *supra* n. 5.

The defendant Coastal Commission in *Avco* conceded to the court that in the context of larger development projects, it did not believe there should be an absolute requirement that the document relied on be designated a "building permit" in order for the developer to obtain a vested right. The Commission stated that if another kind of permit, such as a "conditional use permit," afforded substantially the same specificity and definition to a project as did a building permit, such a permit should suffice. 17 Cal.3d at 793-94, 132 Cal.Rptr. at 391. A "conditional use permit" is another name for a "special use permit," which is what Lakeview has obtained in this case. The *Avco* court did not decide the question whether it would recognize an exception to the building permit rule; rather it held that even if an exception were appropriate, the permits relied on by Avco were insufficient because the permits did not relate to "identifiable buildings," and because maps and plans submitted to the county government did not advise the county of such "elementary details as the dimension, height . . . or placement of the buildings to be built on the tract." 17 Cal.3d at 794, 132 Cal.Rptr. at 392. This rule requiring specificity recognizes that since the grant of a vested right to develop a given tract of land takes away power from the government to control the use of the land, it is fitting that in exchange for yielding that power, the public know the facts concerning the approved use.

Although the court did not definitively decide whether it would recognize an exception to the building permit rule, it stated that its conclusion was "not founded upon an obdurate adherence to archaic concepts inappropriate in the context of modern development practices

nor upon a blind insistence on a document entitled 'building permit.' " 17 Cal.3d at 797, 132 Cal.Rptr. at 394. The court thus left open the question whether a "special use permit," if sufficiently specific, could form the basis of a vested right claim, but the language it used strongly indicates how it would answer the question.

While the court suggested that it would not necessarily insist on a "building permit" as a prerequisite to a vested right, it also suggested that if it were to broaden the class of permits on which developers could rely, it would then have to guard against the dangers of a too broad expansion of the vested rights doctrine:

> If we were to accept the premise that the construction of subdivision improvements or the zoning of land for a planned community are sufficient to afford a developer a vested right to construct buildings on the land in accordance with the laws in effect at the time the improvements are made or the zoning enacted, there could be serious impairment of the government's right to control land use policy. In some cases, the inevitable consequence would be to freeze the zoning law applicable to a subdivision or planned unit development as of the time the events occurred.

17 Cal.3d at 797, 132 Cal.Rptr. at 394.

The district court in this case, in denying the defendants' motion to dismiss, initially held that a building permit was not required, but then in granting summary judgment, reversed itself and held that under California law, a building permit was indeed required. The court then held that under the rule of *Courthouse Plaza Company v. City of Palo Alto*, 117 Cal.App.3d 871, 173 Cal.Rptr. 161

(1981), a developer cannot establish that it has a vested right to complete a given project by showing only that it has performed work pursuant to a permit granted for a different project. It therefore concluded that since Lakeview had performed no construction pursuant to a building permit on Unit Two, it had no vested right to build Unit Two. In addition, the district court found that the Unit Two townhouses, the Unit One townhouses, and the hotel did not constitute an interdependent, unitary project.[9]

Lakeview makes a number of contentions on appeal. It argues that the district court erred in holding that California law requires strict adherence to the "building permit" rule. It argues further that under a rule allowing an exception for sufficiently specific "special use permits," its claim would withstand summary judgment. It argues that there is a genuine factual dispute concerning whether Unit Two is a unitary, interdependent project and that the district court's resolution of the issue was therefore improper on summary judgment.

In light of the *Avco* court's disapproving reference to "blind insistence" on the building permit rule, we are hesitant to affirm the district court's judgment based on

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[9] Under the district court's rationale this finding was unnecessary, since according to the building permit rule, it does not matter how closely related a particular building is to the rest of the project; if no building permit has been obtained for that building, no right attaches. *See Leroy Land Dev. v. Tahoe Regional Planning*, 543 F.Supp. 277 (D.Nev.1982).

the invocation of that rule.[10] We assume, without deciding, that the California Supreme Court would recognize an exception to the rule in the case of sufficiently specific special use permits. We also assume, without deciding, that the special use permit that Lakeview received in 1969 was sufficiently specific to meet the requirements of the *Avco* decision.[11] For even if we were to decide these issues in favor of Lakeview, its claim to a vested right would still fail, because it did not act expeditiously enough in proceeding with the development of the Unit Two townhouses.

In *Avco*, the court said that if it were to accept the premise that a vested right could attach prior to the grant of a building permit, "evils" would result. 17 Cal.3d at 798, 132 Cal.Rptr. at 394. The court offered the following hypothetical to illustrate its point:

> [L]et us hypothesize that because of mounting costs, decreasing demand, or innumerable

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[10] The California lower courts have given conflicting signals on the continuing vitality of the strict "building permit" rule. *Compare Billings v. California Coastal Comm'n*, 103 Cal.App.3d 729, 735, 163 Cal. Rptr. 288, 291 (1980) (suggesting in dicta that building permit "may no longer be the *sine qua non* of a vested right") *with South Cent. Coast Regional Comm'n v. Charles A. Pratt Const. Co.*, 128 Cal.App.3d 830, 845, 180 Cal.Rptr. 555, 563 (1982) (suggesting opposite).

[11] Making this assumption frees us from deciding whether Lakeview's failure to obtain architectural review approval for the Unit Two townhouses would defeat its claim on the ground that it failed to obtain final discretionary approval. *See Tosh v. California Coastal Comm'n*, 99 Cal.App.3d 388, 394-95, 160 Cal.Rptr. 170, 173-74 (1979).

> potential other causes, Avco does not build multiple residential units on tract 7479 for a number of years. If we were to accept [the developer's] premise, the tract would be exempted not only from the current requirements of the Act, but from all zoning laws enacted for an indefinite period in the future. It is no response to those inherent evils to assert that this builder presently intends to construct its multiple residential units expeditiously.

Id.

In this case, even though Lakeview told the City that it intended to build the Unit Two townhouses within six months of completing Unit One, Lakeview chose not to develop the Unit Two townhouses on schedule. Unit One was completed in 1971. Lakeview then waited almost three years before it began any further construction on the development. In 1974 it decided to build the hotel instead of the townhouses. We may assume that Lakeview's decision to depart from its initial plan and build the townhouses after building the hotel would have been immaterial had Lakeview been able to complete both projects in the time anticipated for both, but Lakeview's delays in building the hotel caused the project to drag on even longer. Lakeview has offered no evidence that any governmental agency placed obstacles in its way to developing its project expeditiously until 1981, when Lakeview first indicated it was ready to build the Unit Two townhouses. By that time twelve years had elapsed since the time Lakeview had received its special use permit. In 1969, it could not reasonably have been expected that the land on which Unit Two was to be built would still be undeveloped in 1981. In these circumstances, for Lakeview to argue that the expenditures it

has made on Unit One and the hotel in reliance on the 1969 permit entitle it to a vested right for Unit Two is for it to argue in effect that its right to develop Unit Two is vested forever. Yet such a permanent vesting is the evil that the *Avco* court said that it would not tolerate. It matters not that Unit Two may have been conceived of as a dependent part of a planned unitary development. The rationale for departing from the "building permit" rule as applied to such developments is that preliminary development expenses are high and cannot be recouped if the government prohibits development before a sufficiently substantial portion of the project is completed. When, as in this case, the government does not interfere until well after the time the developer could have completed the entire project, the reason for recognizing a vested right evaporates.

The California courts have recognized that the law of vested rights must balance two conflicting interests: the public interest in lower construction costs that result from providing developers a fair degree of certainty about their investments; and the public interest in controlling pollution and congestion effectively. *See Avco*, 17 Cal.3d at 788, 132 Cal.Rptr. at 388; *Raley v. California Tahoe Regional Planning Agency*, 68 Cal.App.3d 965, 975-76, 137 Cal.Rptr. 699, 708 (1977). As we have noted, the vested rights doctrine draws on the governmental estoppel principle to achieve the balance. In *Avco*, the court held that it would not estop the government from prohibiting a development about which the developer had provided incomplete information. In *Oceanic California, Inc. v. North Central Coast Regional Com'n*, 63 Cal.App.3d 57, 67, 133 Cal.Rptr. 664, 670 (1976), the court held that ("the scope

of the development which the developer has a right to complete . . . is limited by the scope of the specific development theretofore approved and permitted"). It follows from these decisions that the developer should not be able to estop the government when the project temporally exceeds the scope of that approved. In other words, a government's commitment to a "planned unit development" is necessarily conditioned on the developer's proceeding at a pace reasonably close to that contemplated at the time the project was approved. If the public is to be deprived of its power to control pollution and other problems caused by overdevelopment, it should be deprived only to the extent necessary to ensure private parties a reasonable degree of certainty about the legal status of their investments.

In this case, given the scope of the project and its expected duration at the time it was approved, Lakeview may not assert estoppel against the Tahoe governments. Construing the facts submitted most favorably to Lakeview, we hold that a rational trier of fact would be compelled to conclude that Lakeview did not proceed at a pace even reasonably close to that anticipated. Summary judgment was therefore appropriate on the vested rights claim.[12]

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[12] Lakeview also asserts a claim to what it calls a "statutory vested right" in former TRPA Land Use Ordinance § 9.11 (subsequently renumbered § 9.10), the grandfather provision quoted *supra* in section I of this opinion. This claim utterly lacks merit. It is well established that a vested right claim cannot be based on a general zoning ordinance. *HFH, Ltd. v. Superior Court of Los Angeles County*, 15 Cal.3d 508, 516, 125 Cal.Rptr. 365, 370, 542 P.2d 237, 242 (1975) ("landowners have no vested right in existing or anticipated zoning ordinances").

B. *The Remaining Claims*

Lakeview's second claim asks for an injunction to prevent TRPA from imposing any further permitting restrictions on its property on the grounds that such restrictions would constitute an unconstitutional deprivation of property. The claim[13] reiterates the allegations in the vested rights claim adding only the conclusory allegation that the refusal to allow the development of townhouses deprives Lakeview of all economically viable use of its land. This additional allegation purports to take the claim out of the realm of the state law vested rights doctrine and into the realm of the federal Constitution's prohibition against deprivations of property without due process of law. Even though we read them most sympathetically to the pleader, Lakeview's complaint and affidavits fail to make out a claim. "Under [Fed.R.Civ.P.] 56(c), the motion for summary judgment should have been granted in [defendant's] favor if the amended complaint and affidavits showed that there was no genuine issue as to any material fact and that appellees were entitled to a judgment as a matter of law." *Ellis v. Carter,* 291 F.2d 270, 275 (9th Cir.1961). We are "free to affirm on any ground supported by the record, provided the parties

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[13] The claim reads in relevant part: As a result of Defendants' refusal to allow completion of construction of the Townhouses, and as a result of the overly stringent land use restrictions which TRPA currently seeks to impose *to prevent Plaintiff from completing construction of the project,* Plaintiff has been deprived of the entire practical, substantial, viable . . . economic . . . use of its property without due process of law in violation of the Fifth and Fourteenth Amendment. (Emphasis ours).

have an opportunity to discuss it in their briefs." *Paskaly v. Seale*, 506 F.2d 1209, 1211 n. 4 (1974). Although the district court granted summary judgment against Lakeview *sua sponte* on the second claim and did not make clear its grounds for so doing, Lakeview has fully discussed the claim in its briefs.

Lakeview's complaint asserts a constitutional right to build the precise project it proposed in 1969. As we noted in *Hoehne v. County of San Benito*, 870 F.2d 529, 532-33 (9th Cir.1989), "The Supreme Court has recognized that land-use planning is not an all-or-nothing proposition. A government entity is not required to permit a landowner to develop property to the full extent it may desire. Denial of the intensive development desired by a landowner does not preclude less intensive, but still valuable development." Lakeview makes no allegation that it has attempted to ask TRPA for a less intensive use of its land, nor does it allege that such an attempt would be futile. The complaint is thus defective under *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 353, 106 S.Ct. 2561, 2568, 91 L.Ed.2d 285 (1986). Moreover, it is clear from Lakeview's submissions that it has not been denied all economically viable use of its land and that its reasonable investment backed expectations have not been upset. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978); *Moore v. City of Costa Mesa*, 886 F.2d 260, 263 (9th Cir.1989). Lakeview bought the land in question in 1967 for one million dollars. Since then, it has constructed fourteen townhouses on the property, and it and its successors have built a 160-unit hotel, as well. Of the 200 units Lakeview initially wanted to build, only 28 will not be permitted. We have

upheld far more drastic curtailments of land uses. *See, e.g., Haas v. City and County of San Francisco*, 605 F.2d 1117, 1119-20 (9th Cir.1979). In *Haas*, the landowner purchased property zoned in an area with a height limit of 300 feet and obtained a permit to build. Subsequently, the land was rezoned to restrict the construction of buildings higher than 40 feet, which restriction caused the land to diminish in value from two million dollars to one hundred thousand dollars. Since Lakeview's own submissions make clear that the defendants' refusal to allow Lakeview to complete the project has not deprived Lakeview of all economically viable use of the land, we affirm the grant of summary judgment on the second claim. As the appellees argue in their brief, the claim is essentially a reiteration of the vested rights claim "dressed up" as a constitutional claim.

The third and fourth claims ask for money damages for the deprivation of property without due process. The district court dismissed them on the authority of *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353 (9th Cir.1977), *rev'd in part on other grounds sub nom. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979). In light of the Supreme Court's decision in *First English Evangelical Lutheran Church*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987), Jacobson is no longer good law. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 911 F.2d 1331, (9th Cir.1990) (as amended). Nonetheless, the claims are identical to the second claim in that the only injury they allege is Lakeview's inability to

complete the project. We therefore find them deficient for the same reasons we find the second claim deficient.

CONCLUSION

The judgment is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

LAKEVIEW DEVELOPMENT CORPORATION a California corporation, Plaintiff, vs. CITY OF SOUTH LAKE TAHOE, a Municipal Corporation, the TAHOE REGIONAL PLANNING AGENCY, a separate legal entity created pursuant to an interstate Compact between the States of Nevada and California, and DOES 1 through 30, Defendants.	NO. CIVS-85-0975-RAR MEMORANDUM AND ORDER FILED MARCH 12, 1986

The matter at issue is Defendant Tahoe Regional Planning Agency's ("TRPA") challenge to the legal sufficiency of the First, Third, and Fourth Claims for Relief of Plaintiff's Complaint, made by a FRCP 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted.

For purposes of this motion to dismiss, all of the well-pleaded material facts alleged by Plaintiff must be taken as true. It is Defendant TRPA's burden to show beyond doubt that Plaintiff can prove no set of facts in

support of Plaintiff's claim that would entitle Plaintiff to relief.

1. *First Claim for Relief*

In the First Claim for Relief, Plaintiff seeks declaratory and injunctive relief to establish its vested rights to complete construction of 28 townhouses. Plaintiff's claim of vested rights is predicated on the doctrine of equitable estoppel, in its several variations including (1) Plaintiff's substantial expenditures in good-faith reliance upon governmental approval (herein referred to as "traditional" vested rights), (2) TRPA's acquiescence to construction of more than 85% of the subdivision improvements ("TRPA's acquiescence"), and (3) statutory vested rights under the TRPA Compact and Ordinance ("statutory" vested rights).

First, with respect to Plaintiff's "traditional" vested rights claim, several of the allegations of the Complaint are important. According to the Complaint, the 28 townhouses are a portion of the improvements described in the final subdivision map of Heavenly Valley Hotel & Townhouses Unit No. 2, recorded November 20, 1970. The balance of the subdivision improvements, including 158 units in the hotel, constitute approximately 85% of the entire project, construction of which has been completed at substantial expense in compliance with the detailed final subdivision map and various approvals from governmental entities, including the California Tahoe Regional Planning Agency, and the City of South Lake Tahoe, which issued numerous building permits for the construction. These allegations support Plaintiff's

"traditional" vested rights claim of substantial expenditures in good-faith reliance upon governmental approvals giving rise to an estoppel of the TRPA from applying a supervening change in land use regulations to prevent completion of the 28 townhouses.

Defendant TRPA contends that Plaintiff could not have obtained "traditional" vested rights to complete construction of the 28 townhouses in the absence of obtaining and making substantial expenditures in reliance upon building permits for the 28 townhouses. Defendant TRPA relies upon *Avco Community Developers, Inc. v. South Coast Regional Commission*, 17 Cal. 3d 785, 132 Cal. Rptr. 286 (1976), and *Leroy Land Development Corporation v. Tahoe Regional Planning Agency*, 543 F. Supp. 277 (D. Nev. 1982). The Court finds neither of these decisions compelling in the case at bar.

While a building permit was held to be required to establish a vested right in the *Avco* situation, the case at bar is differentiated from the *Avco* decision by at least the following. In *Avco*, there was no submission of building plans and no obtaining of building permits for any structure. Basically, the *Avco* project was little more than a paper project. In contrast, as indicated above, construction of more than 85% of Plaintiff's project has been completed pursuant to a detailed final subdivision map and numerous building permits for various structures.

Further, dicta in the *Avco* decision indicated that a building permit may no longer be the sine qua non of a vested right. This was repeated in numerous California cases that were the progency [sic] of *Avco*. In the decision

in *Leroy Land, supra,* the court recognized that in California the law of vested rights was evolving toward permitting reliance on governmental approvals other than just building permits. But the learned judge felt constrained not to carve out an exception to the building permit requirement as recognized merely by dicta in several California cases. Now the proposition that vested rights may be established by substantial reliance upon governmental approvals other than just building permits is no longer just dicta. *California Coastal Com. v. Alves,* 173 Cal. App. 3d 150, ___ Cal. Rptr. ___ (September 1985). Accordingly, the Court finds that Plaintiff has stated a sufficient claim for "traditional" vested rights based upon Plaintiff's substantial expenditures in good-faith reliance upon governmental approval of the final subdivision map.

Second, with respect to Plaintiff's claim for vested rights based on TRPA's acquiescence, the Court cannot find, taking all of Plaintiff's well-pleaded allegations as true, that Plaintiff has not stated a claim upon which relief can be granted. It appears from the Complaint that after the final subdivision map for Unit No. 2, which includes the 28 townhouses at issue, was approved in 1970, the street improvements were mostly completed by 1973; and the City of South Lake Tahoe was prepared to issue a building permit for construction of the hotel foundation in mid-1974. At that juncture, TRPA asserted that no building permit should be issued until and unless TRPA first issued an administrative permit. TRPA threatened a lawsuit and injunctive relief to be had. Nevertheless, the City issued the building permit. By mid-August, 1974, TRPA backed off from the threatened lawsuit. In reliance thereon, construction of the hotel was completed.

The Court finds that Plaintiff has certainly alleged a claim for relief for estoppel based on TRPA's acquiescence.

Third, with respect to Plaintiff's claim of "statutory" vested rights, the Court recognizes that this is a very difficult and unique area of the law. Having already found that Plaintiff has stated a claim for relief based on traditional vested rights and TRPA's acquiescence, the Court is also going to deny the motion to dismiss with respect to statutory vested rights, leaving this determination for another day, perhaps on cross-motions for summary judgment.

2. *Third Claim for Relief*

In the Third Claim for Relief, Plaintiff seeks to recover monetary damages from Defendant TRPA for inverse condemnation. Based upon *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353 (9th Cir. 1977), the Court finds the motion to dismiss is appropriate.

3. *Fourth Claim for Relief*

In the Fourth Claim for Relief, Plaintiff asserts a monetary damage claim under 42 U.S.C. Section 1983. To remain consistent, perhaps albiet [sic] erroneously consistent, with disposition of the Third Claim for Relief, the Court grants the motion to dismiss the Fourth Claim for Relief. The Court finds that *Martino v. Santa Clara Valley Water District*, 703 F.2d 1141 (9th Cir. 1983), is not applicable, and that *Tahoe-Sierra Preservation Council, et al. v. Tahoe Regional Planning Agency, et al.*, CIVS-84-0816-EJG, Order of January 22, 1985, is applicable.

For the reasons set forth above, and good cause appearing therefor,

IT IS HEREBY ORDERED that Defendant TRPA's motion to dismiss the First Claim for Relief is denied, and

IT IS FURTHER ORDERED that Defendant TRPA's motion to dismiss the Third and Fourth Claims for Relief are granted.

Dated 3-11-86.

/s/ Raul Ramirez
U.S. DISTRICT JUDGE

APPENDIX C

HEATON & DOESCHER, LTD.
Louis R. Doescher, Esq.
P. O. Box 605
304 South Minnesota Street
Carson City, Nevada 89702
702/882-2164

Attorneys for Defendant
Tahoe Regional Planning Agency

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

LAKE VIEW DEVELOPMENT CORPORATION, a California corporation, Plaintiff, v. CITY OF SOUTH LAKE TAHOE, a municipal corporation, the TAHOE REGIONAL PLANNING AGENCY, a separate legal entity created pursuant to an interstate compact between the States of Nevada and California, and DOES 1 though [sic] 30, Defendants.	CASE NO. CIVS-85-975-RAR FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND SUMMARY JUDGMENT FILED JANUARY 12, 1989

THIS CAUSE having come on for hearing on the 26th day of September, 1988, upon the motion of the defendant, TAHOE REGIONAL PLANNING AGENCY (TRPA),

for summary judgment and upon the motion of the intervening defendant, STATE OF CALIFORNIA, for summary judgment, and the parties being represented by their respective counsel of record, and the Court having reviewed the pleadings on file herein together with the supporting affidavits, and having heard and considered the arguments of counsel, and good cause appearing, the Court now enters its Findings of Fact, Conclusions of Law, and Order granting Summary Judgment as follows:

I.

FINDINGS OF FACT:

1. On December 3, 1968 the South Lake Tahoe City Council approved Lakeview's tentative map, together with an application for a special use permit, for property which is the subject matter of this litigation and other contiguous property. The 1968 tentative map was entitled "Heavenly Valley Condominiums and Hotel." (Herein plaintiff and its predecessors in interest will be referred to as "Lakeview".)

2. Subsequently, there were various proposed changes to the tentative map and on May 20, 1969 the South Lake Tahoe City Council approved the amended map which then was entitled "Heavenly Valley Hotel and Townhouses." A portion of the said tentative map was entitled "Heavenly Valley Hotel and Townhouses Unit #1" which consisted of 14 proposed condominium units. The said tentative map further included Heavenly Valley Hotel and Townhouses (HVHT) Unit #2 which, in turn, included, among other parcels, Parcel "E" (hereinafter Parcel "E" will be referred to as the "subject property")

upon which Lakeview desired to construct twenty-eight (28) townhouse units, and Parcel "B" which consisted of the property upon which the proposed hotel was to be constructed.

3. On June 13, 1969 the California Tahoe Regional Planning Agency (CTRPA) approved the tentative map consistent with the terms of approval of the City of South Lake Tahoe. Thereafter, in accordance with the special use permit and the tentative map approvals, Lakeview constructed and installed off-site improvements such as roads, gutters, fire hydrants and curbs.

4. There were two final maps recorded for the entire subdivided area. The first final map was approved and recorded in El Dorado County on November 7, 1969 which map was entitled "Heavenly Valley Hotel and Townhouses, Unit #1" (HVHT, Unit #1) and establishes townhouse lots 1-14. The second final map was recorded November 24, 1970 and establishes townhouse lots 15-42 as well as a parcel wherein a hotel could be sited. The second final map is entitled "Heavenly Valley Hotel and Townhouses, Unit #2" (HVHT, Unit #2).

5. By the end of 1973, Lakeview had built the 14 residential townhouses on the parcels established by HVHT, Unit #1.

6. Lakeview's original plan provided for a phased development. The units in HVHT Unit #1 were to be constructed first, and after the sale thereof townhouses 15-42 in HVHT Unit #2 were to be built and presumably sold. Thereafter, the hotel on parcel "B", HVHT Unit #2, was to be constructed. These plans were voluntarily altered by Lakeview in 1974 when it made a decision to

commence construction of the hotel and to abandon construction of townhouses 15-42, HVHT Unit #2. Prior to this decision, Lakeview had obtained foundation permits to construct some of the townhouses in HVHT Unit #2 and, after said decision, the foundation construction and the permits therefor were abandoned before significant work was done.

7. In 1974, in accordance with its new construction plan, Lakeview obtained a building permit for foundation construction of the hotel and the Tahoe Regional Planning Agency (TRPA) at that time, through its then counsel, Gary Owen, Esq., at first objected to foundation construction, but later allowed without objection foundation construction.

8. In 1979 Lakeview sold the hotel to an independent third party which completed hotel construction.

9. At all times since their completion, the amenities (clubhouse and swimming pool) and townshouses [sic] in HVHT Unit #1 have operated independently from the hotel portion of HVHT Unit #2. Likewise, the hotel, since its completion by the third party purchasers, has operated independently from the townshouses [sic] in HVHT Unit #1. Both the hotel and the townshouses [sic] in HVHT Unit #1 have operated since their completion independent from the proposed townshouses [sic] 15-42 in HVHT, Unit #2.

10. At the present time Lakeview does not have, nor has it ever had, building permits from any governmental entity for units 15-42. The only permits granted in connection with these units were the 1974 foundation permits which were subsequently relinquished by Lakeview

prior to any significant construction. Neither the TRPA nor the CTRPA have ever affirmatively represented in any way that Lakeview could proceed with construction of townhouses 15-42 in HVHT, Unit #2.

11. The TRPA enacted in 1972 a Land Use Ordinance which provided, pursuant to Section 9.10 thereof, that certain projects, such as Lakeview's in the matter at bar, would be "grandfathered", i.e. would not be subject to the then existing ordinance restrictions and requirements. From 1972 until 1980, Lakeview's project came within the purview of said ordinance. The ordinance was repealed in 1980. Prior to that repeal, Lakeview did not rely, to its detriment, upon said ordinance by engaging in construction of any of the townshouses [sic] 15-42 mapped within parcel "E" of HVHT, Unit #2.

12. Lakeview has not performed any construction work on the subject premises other than improvements referenced in paragraph #3 hereof.

13. Lakeview has failed to substantially rely in good faith on any governmental permit in respect to construction of proposed townhouses 15-42 of HVHT, Unit #2.

14. Lakeview and the TRPA have entered into a Stipulation providing that there does not exist in these proceedings an administrative procedure sufficient to provide that this court may determine as a matter of law that Lakeview has failed to exhaust administrative remedies. Likewise, it is the position of the TRPA in this litigation that its present ordinances, to which it must adhere, do not provide for administrative consideration of vested rights absent a valid foundation in place or a valid permit for foundation construction.

II.

CONCLUSIONS OF LAW:

Based upon the foregoing Findings of Fact, the court concludes as follows:

1. That it has jurisdiction over the parties and causes of action herein.

2. The court should follow the vested rights law of the states which have adopted and enacted the Tahoe Regional Planning Compact, Public Law 96-551; NRS 277.200 *et seq.;* Calif. Gov't Code Section 6680 *et seq.*

3. The real property which is the subject matter of this litigation is situated in the State of California and California vested rights law provides that a vested right to construct buildings in a planned unit development can only arise where a property owner has performed substantial work or incurred substantial liability in good faith reliance upon a valid permit. *Oceanic Cal., Inc. v. North Central Coast Regional Commission,* 630 [sic] Cal.App.3d 57, 133 Cal.Rptr. 664 (1976), appeal dismissed 431 U.S. 951, 53 L.Ed 2d, 267 (1977); *Avco Community Developers v. South Coast Regional Commission,* 17 Cal.3d 785; 553 P.2d 546 (1976). The *Avco* case, decided some 12 years ago, provides that a property owner must have been issued a valid building permit and substantial work performed in reliance thereon before a project can be considered to be vested. Since *Avco,* California courts have been uniform in this holding.

The court, therefore, concludes as a matter of law that the defendants' motion for summary judgment must be granted inasmuch as Lakeview does not have valid

building permits for proposed units 15-42 in HVHT, Unit #2 and possesses no vested right for their construction.

4. Lakeview has not substantially relied upon the provisions of TRPA's Land Use Ordinance, Section 9.10, in that Lakeview failed to construct improvements on the subject property or to incur substantial liabilities in respect to same.

5. As a matter of law the subject property is independent from and not connected with contiguous parts of the development. Given the holding in *Courthouse Plaza Company v. City of Palo Alto*, 17 Cal.App.3d 871, 173 Cal.Rptr. 161 (1981), this court concludes as a matter of law that said proposed units 15-42 are not interdependent with other portions of the entire development. Lakeview's approvals and construction of other portions of its development cannot, therefore, provide a basis for a vested right for the subject property.

6. A unitary development, as urged by Lakeview, requires an absolute interdependence of the entire project. Such interdependence is lacking in the matter at bar.

7. Absent the issuance of building permits, there is no governmental representation upon which Lakeview could prevail under a theory of estoppel. *Avco, supra.*

8. This court should not extend California law beyond *Avco* and subsequent cases and determine that Lakeview has a vested right absent issuance of building permits for units 15-42, HVHT, Unit #2.

9. Each party hereto should bear their own attorney's fees in connection with this litigation.

III.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND SUMMARY JUDGMENT:

Based upon the foregoing Findings of Fact and Conclusions of Law, it is the order of the court as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the motions for summary judgment filed herein by the TRPA and the intervening defendant, State of California be, and the same hereby are, granted and said defendants' hereby are awarded summary judgment against Lakeview.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants shall be allowed costs as the prevailing parties in this litigation. Each party shall pay and be responsible for their own attorney's fees.

DATED this 12th day of Jan, 1989.

/s/ Raul Ramirez
District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LAKEVIEW DEVELOPMENT CORPORATION, a California corporation, Plaintiff-Appellant, v. CITY OF SOUTH LAKE TAHOE, a municipal corporation; TAHOE REGIONAL PLANNING AGENCY, a separate legal entity created pursuant to an interstate Compact between the States of Nevada and California, and Does 1 through 30, Defendants-Appellees.	No. 89-15214 D.C. No. CV-85-0975-RAR ORDER FILED DECEMBER 17, 1990

Before LIVELY,* FLETCHER and REINHARDT, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judges Fletcher and Reinhardt have voted to deny the suggestion for rehearing en banc, and Judge Lively so recommends.

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* Honorable Pierce Lively, Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX E

Lawrence L. Hoffman
Robert Damon Spitzer
Hoffman, Lien, Faccinto & Spitzer
P.O. Box 7740
Tahoe City, CA 95730
(916) 583-8542

Dale L. Sare
Kingston & Sare
P.O. Box AK
South Lake Tahoe, CA 95705
(916) 541-8335

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

LAKEVIEW DEVELOPMENT CORPORATION a California corporation, Plaintiff, vs. CITY OF SOUTH LAKE TAHOE, a Municipal Corporation, the TAHOE REGIONAL PLANNING AGENCY, a separate legal entity created pursuant to an interstate Compact between the States of Nevada and California, and DOES 1 through 30, Defendants.	NO. 85-0975 RAR COMPLAINT FOR DECLARATORY RELIEF, INJUNCTIVE RELIEF, AND DAMAGES Filed July 12, 1985 PLAINTIFF DEMANDS A JURY TRIAL

Plaintiff alleges as follows:

I. JURISDICTION AND VENUE

1. This action challenges the authority of the Defendant Tahoe Regional Planning Agency, a bi-state planning agency formed by an interstate Compact, to prevent Plaintiff from completing construction of its townhouse project in the City of South Lake [sic] the Compact Clause (Article 1, Section 10, Clause 3) of the Constitution of the United States, the Fifth and Fourteenth Amendments to the Constitution, the Federal Civil Rights Act (42 U.S.C. Secs. 1983 and 1985), 28 U.S.C. Secs. 2201 and 2202 (Declaratory Relief), and the Tahoe Regional Planning Compact (P.L. 96-551; 94 Stat.3233) as more fully appears herein. Jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Secs. 1331 and 1343 and Article VI(j) of the Tahoe Regional Planning Compact (hereafter the "Compact").

2. Venue is proper in this Court pursuant to Article VI(j) of the Compact and 28 U.S.C. Secs. 1391 et seq., in that the real property that is the subject of this action is situated in El Dorado County, State of California.

THE PARTIES

3. Plaintiff, Lakeview Development Corporation, is a California corporation engaged in business in El Dorado County, California. Plaintiff is the owner of the real property described as Townhouse Lots 15-42 and Parcel E (Common Area) as shown on the record Final Subdivision Map of Heavenly Valley Hotel & Townhouses Unit No. 2, recorded in the office of the El Dorado County Recorder

on November 24, 1970 (hereinafter the "Townhouses"). The business of Plaintiff is to hold, complete construction of, manage, and sell the Townhouses.

4. Defendant City of South Lake Tahoe (hereinafter the "City"), is a municipal corporation organized and existing under the laws of the State of California. At all times material herein, the City had and continues to have jurisdiction to issue building permits and other entitlements for use and development of the Townhouses, which are located within the City.

5. Defendant Tahoe Regional Planning Agency (hereinafter the "TRPA") is a separate legal entity created by the Tahoe Regional Planning Compact (P.L. 96-551, 94 Stat. 3233; California Government Code Section 66801), an interstate Compact between the States [of] California and Nevada.

6. Does 1 through 15 are persons or entities whose names are not presently known to Plaintiff. Such Defendants are the agents and servants of each other and the Defendants named herein and have actively aided and assisted the named Defendants in the acts described herein.

7. Does 16 though 30 are persons or entities whose names are not presently known to Plaintiff. Such Defendants are other agencies or persons who claim jurisdiction over the activities in connection with the construction, management, and operation of the Townhouses as hereinafter further described.

FACTUAL BACKGROUND

8. In May, 1969, the City approved a Tentative Subdivision Map and a Special Use Permit for the Heavenly Valley Hotel & Townhouses project, consisting of a 158-unit hotel and 42 townhouses (including the 28 townhouses that constitute the Townhouses at issue herein). As a condition of approval, the City required review and approval of the project by the California Tahoe Regional Planning Agency (hereinafter the "CTRPA"). On June 18, 1969, the CTRPA approved the entire Heavenly Valley Hotel & Townhouses project. At that time, the Defendant TRPA was not in existence.

9. Thereafter, the City proceeded to issue its final approvals. In October and November, 1969, the City approved the Final Subdivision Map of Heavenly Valley Hotel & Townhouses Unit No. 1, a portion of the previously approved Tentative Subdivision Map. Unit No. 1 consisted of townhouse lots 1-14 plus common area as shown on the previously approved Tentative Map. Plaintiff and the City entered into an appropriate Subdivision Improvement Agreement, the Final Map of Unit No. 1 was recorded, and the City issued building permits for the first townhouse building to be constructed in Unit No. 1. Subsequently, over the next three years, the City issued various building permits for the remainder of the townhouse buildings and other structural improvements in Unit No. 1.

10. On August 18, 1970, the City confirmed by letter to Plaintiff that the City would issue, from time to time, the necessary building permits for the buildout of the Heavenly Valley Hotel & Townhouses project as they

were requested and as final plans were submitted for ordinary plan check and approval, and as found to be consistent with the City ordinances.

11. On November 17, 1970, the City approved the final Subdivision Map of Heavenly Valley Hotel & Townhouses Unit No. 2, the remainder of the project consisting of the 158-unit hotel, townhouse lots 15-42 together with Common Area (the "Townhouses" at issue herein), and Parcels C and D, which were portions to be dedicated to the City for streets. The City also accepted Plaintiff's dedication of streets and easements and entered into a Subdivision Improvement Agreement with Plaintiff with respect to Unit No. 2. Plaintiff posted an appropriate bond. On November 20, 1970, the Final Map of Unit No. 2 was recorded. By November, 1973, construction of the street improvements for Unit No. 1 and Unit No. 2 were largely completed.

12. In early 1974, the City Building Department was conducting a plan check of the plans for the hotel foundation, preparatory to issuance of a building permit for the foundation of the hotel portion of the structural improvements to be created in accordance with Unit No. 2. On July 22, 1974, Gary Owen, attorney for the TRPA, contacted the City Building Department by letter and requested them to advise the TRPA of the issuance of any building permit for the hotel. Mr. Owen asserted TRPA's position that no permit should be issued by the City unless TRPA first issued an administrative permit.

13. On July 24, 1974, the City responded to Mr. Owen's letter, advising that since the project had been approved by the City Planning Commission, the City

Council, the City Architectural Review Committee, and the CTRPA prior to the enactment of the TRPA regulations, and since a substantial portion of the development had been completed pursuant to such approvals, the City would issue a foundation permit for the hotel. The City thereafter issued to Plaintiff a building permit for the hotel foundation.

14. On July 26, 1974, Mr. Owen delivered a letter to Plaintiff advising that TRPA considered that the hotel foundation building permit was improperly issued, that construction of the hotel could proceed only pursuant to TRPA approval and issuance of an administrative permit, and that commencement of construction without such TRPA approval would be in violation of the TRPA Land Use Ordinance. TRPA also advised that the plans for the hotel did not meet TRPA requirements. Further, TRPA noted that construction had commenced on July 26, 1974. The letter explicitly threatened that TRPA would seek prompt injunctive relief to halt construction.

15. Immediately after receipt of the letter, Plaintiff's representatives engaged in discussions with Mr. Owen. Plaintiff stressed that the construction of structures in Unit No. 2 was "grandfathered" with respect to TRPA approval by virtue of the TRPA Land Use Ordinance, Section 9.10 (then Section 9.11). Section 9.10 provided that uses of land and structures to be created in connection with a subdivision, the final map of which was approved by the appropriate local government within five years prior to February 10, 1972, are uses that were "grandfathered", in that they could be continued, transferred, or

sold, despite their nonconformance with the TRPA regulations established by the Land Use Ordinance adopted on April 11, 1972.

16. Contemporaneously with the discussions with Mr. Owen (TRPA's attorney), Plaintiff commenced and continued construction of the hotel pursuant to the building permit issued by the City. In mid-August, 1974, Mr. Owen informed Plaintiff that TRPA would not further pursue the action threatened in his letter of July 26, 1974. Accordingly, relying on TRPA's acquiescence to construction, Plaintiff proceeded with such construction.

17. In July, 1974, the CTRPA also expressed an interest in the project for the first time in five years. On July 28, 1974, the CTRPA notified the City that the CTRPA was issuing a stop work order against the project because it had not been reviewed by the CTRPA. The City responded by reminding the CTRPA of CTRPA's prior approval of the project on July 18, 1969. CTRPA then took no action to enforce its stop work order, and extensive foundation construction continued throughout the balance of 1974 and into Spring, 1975.

18. In May, 1975, Plaintiff sought an additional building permit for the hotel structure itself, a major element of the Unit No. 2 Final Map. On May 21, 1975, the City issued to Plaintiff a building permit to construct a 160-room hotel. Neither TRPA nor CTRPA opposed issuance of that building permit. In reliance upon TRPA's acquiescence, Plaintiff commenced construction of the hotel structure. Construction of the hotel continued into 1979.

19. In October, 1979, the CTRPA asserted that no further construction on the project was authorized pending CTRPA review of the question of the project's exemption from CTRPA more recent requirements. Construction continued.

20. On October 19, 1979, the TRPA issued an administrative permit to allow grading work on the project site after the October 15 grading deadline established by TRPA's ordinances.

21. On December 18, 1979, the City acknowledged completion of the subdivision improvements constructed in conjunction with Unit No. 2, exonerated the bond, and formally accepted the easements and dedications into the City street system. Construction continued through 1980 and 1981 on the hotel.

22. On August 20, 1981, Plaintiff requested the City to issue building permits for construction of the remaining townhouses [sic] structures included in the approved Final Map of Unit No. 2. The City responded by notifying the Plaintiff and TRPA that the City was prepared to issue the building permits unless "a cease and desist order" were to be issued.

23. In September and October, 1981, the TRPA responded through Attorney Owen that the City should not issue building permits for the Unit No. 2 Townhouses and Plaintiff should not commence construction of the Townhouses absent a determination of vested rights by the TRPA Governing Body.

24. Hotel structure construction continued into 1982. On April 19, 1982, Plaintiff's successors in interest

in the hotel portion of the Unit No. 2 (the "Hotel") commenced an action in El Dorado County Superior Court, seeking an injunction to prevent CTRPA from halting construction of the project, which CTRPA was then threatening to do. The CTRPA, represented by the California Attorney General, filed a cross-complaint seeking an injunction halting construction. Following a Superior Court ruling favoring the Hotel, the CTRPA sought a writ of mandate from the Court of Appeal. Eventually, the parties agreed to a settlement whereby the Hotel paid certain mitigation fees and construction was allowed to continue. The TRPA did not join CTRPA in this action, nor make any effort to intervene, apparently because TRPA believed that it was bound by its prior determination of the grandfathered status of the project and its previous acquiescence to construction.

25. Construction of the hotel structure continued in 1982 and 1983, being completed in December, 1984. With completion of the construction of the hotel, as well as the improvements in the Unit No. 1 portion of the project, approximately 80% of the previously approved project had been completed.

26. In July, 1984, Plaintiff renewed its request for issuance of building permits for the remaining Townhouses so as to complete the entire project. TRPA, through its legal counsel, then reasserted its position that the City cannot issue the building permits and Plaintiff cannot commence construction of the Townhouses absent a determination of vested rights by the TRPA Governing Body. In spite of subsequent discussion between Plaintiff and TRPA, TRPA's position continues to be that Plaintiff

has no right to complete construction of its project pursuant to the previously approved and recorded Final Subdivision Map, unless TRPA first conducts an administrative "vested rights" hearing, and finds that Plaintiff has such "vested rights". However, TRPA currently has no such established "vested rights" administrative process, and has advised Plaintiff that even if it were to apply for such a determination, TRPA is currently legally precluded from undertaking such an administrative review.

27. As a result of TRPA's position, the City has now refused to issue to Plaintiff building permits for the Townhouses, and Plaintiff has been unable to commence or complete construction of the remainder of the project.

FIRST CLAIM FOR RELIEF

(Declaratory and Injunctive Relief)

28. Plaintiff incorporates Paragraphs 1 through 27 as though fully set forth here at length.

29. A dispute and controversy has arisen between Plaintiff and Defendant TRPA by reason of the fact that Plaintiff asserts, and Defendant TRPA denies, that Plaintiff is exempt from further TRPA review or approval with respect to the Townhouses for the following reasons: (a) After having relied upon the approval of the Final Maps for Units No. 1 and 2, and having commenced and completed construction of a substantial portion of the improvements described therein, Plaintiff has, under established principles of law, a "vested right" to proceed to complete construction of the remaining improvements; (b) When Plaintiff commenced construction in reliance

upon the approved Final Map for Unit No. 2 and the approvals of the City and CTRPA, the applicable provisions of the TRPA Land Use Ordinance provided that no further TRPA approvals were to be required, and TRPA agreed it was bound thereby; and (c) By its prior determination not to take any action to halt issuance of building permits for or construction of the substantial improvements constructed in the Unit No. 2 subdivision, including the Motel and other subdivision improvements, TRPA waived its right to now assert jurisdiction over the project, and accordingly is estopped from now attempting to assert jurisdiction to review the project.

30. Plaintiff contends that it has a legally protected vested right to complete construction of the remaining structural improvements in Unit No. 2, including the remaining Townhouses, and is exempt in all respects from the jurisdiction of the TRPA. Defendant TRPA, on the other hand, contends that it has jurisdiction under the Compact over the remaining activities of the project, and that further construction of the Townhouses will require additional TRPA administrative review. TRPA has taken steps to interfere with and prevent the City's issuance of the building permits.

31. A dispute and controversy has arisen between Plaintiff and Defendant City by reason of the fact that Plaintiff asserts that it is entitled to receive from the City building permits for the Townhouses, and the City, due solely to the controversy raised by TRPA's position, has declined to issue such building permits until the matter of TRPA's jurisdiction over the project is resolved.

32. Accordingly, Plaintiff now seeks a declaratory judgment from the Court establishing that, based on the doctrines of vested rights and waiver and pursuant to the applicable provisions of the Compact and TRPA Ordinances, completion of the remainder of Plaintiff's project is not subject to TRPA's further review, and that Plaintiff has a legal right to apply for final building permits to complete construction of the project, pursuant to the Final Subdivision Map for Unit No. 2 and subject to the prior conditions of approval and currently applicable building code requirements.

SECOND CLAIM FOR RELIEF

(Injunctive Relief for Denial of Due Process)

33. Plaintiff realleges Paragraphs 1-32 at though fully set forth here at length.

34. As a result of Defendants' refusal to allow completion of construction of the Townhouses, and as a result of the overly stringent land use restrictions which TRPA currently seeks to impose to prevent Plaintiff from completing construction of the project, Plaintiff has been deprived of the entire practical, substantial, viable, beneficial, reasonable, economic, and feasible use of its property without due process of law in violation of the Fifth and Fourteenth Amendments.

35. Plaintiff has suffered and will continue to suffer irreparable injury as a result of Defendants' actions.

36. Plaintiff has no reasonable administrative remedy to pursue.

37. Since Defendants' actions depriving Plaintiffs of property without due process of law are unconstitutional and void, Plaintiff is entitled to an injunction preventing Defendants from interfering with completion of construction of the Townhouses in accordance with the prior conditions of approval and applicable building code requirements.

THIRD CLAIM FOR RELIEF

(Damages and Injunctive Relief for Inverse Condemnation)

38. Plaintiff realleges Paragraphs 1-37 as though fully set forth at length.

39. As a result of Defendants' refusal to allow completion of construction of the Townhouses, and as a result of the overly stringent land use restrictions which TRPA currently seeks to impose to prevent Plaintiff from completing construction of the project, Plaintiff has been deprived of the entire practical, substantial, viable, beneficial, reasonable, economic, and feasible use of its property resulting in the taking of its property without payment of just compensation, in violation of the Fifth and Fourteenth Amendments of the Constitution.

40. Plaintiff is entitled to recover damages in payment of just compensation for such taking in an amount substantially in excess of $10,000, in accordance with proof at trial and for such period as the Plaintiff's property has found to have been taken as a result of the actions of Defendants.

41. Plaintiff is also entitled to injunctive relief invalidating the actions of Defendants that have prevented Plaintiff from completion of construction of the Townhouses and enjoining Defendants from interfering with completion of construction of the Townhouses subject to the prior conditions of approval and applicable building code requirements.

FOURTH CLAIM FOR RELIEF

(Damages and Injunctive Relief for Violation of Civil Rights)

42. Plaintiff realleges Paragraphs 1-40 as though fully set forth here at length.

43. Defendants, acting in their official capacities and under color of state law, have, by their actions described herein, deprived Plaintiff of the rights and privileges secured by the Constitution as specifically alleged above.

44. As a result of Defendants' actions, Plaintiff has suffered substantial damages resulting from delays in completing the project and the interim and/or permanent taking of Plaintiff's property in an amount in excess of $10,000 to be established in accordance with the proof at trial.

45. Pursuant to the provisions of 42 U.S.C. 1983 and 1985 (3), Plaintiff seeks appropriate injunctive and declaratory relief and damages against Defendants, together with an award of its attorneys' fees and costs of suit.

WHEREFORE, Plaintiff prays for relief as follows:

1. On the FIRST CLAIM FOR RELIEF, for judgment declaring as follows: that Plaintiff's activities and construction in connection with the Townhouses are exempt from the further jurisdiction of the TRPA, and that Plaintiff has a vested right to complete the construction of the project subject only to compliance with prior conditions of approval, and that the City shall issue the required building permits for the Townhouses so long as all applicable building code requirements are complied with and the requisite fees are paid;

2. On the SECOND CLAIM FOR RELIEF, for judgment declaring that Plaintiff has been deprived of its property without due process of law and for an injunction preventing Defendants from interfering with completion of construction of the Townhouses subject only to compliance with the prior conditions of approval and the applicable building code requirements;

3. On the THIRD CLAIM FOR RELIEF, for damages in excess of $10,000, as shall be established by proof at trial, for taking of Plaintiff's property without payment of just compensation and for an order preventing Defendants from interfering with completion of construction of the Townhouses, subject only to compliance with the prior conditions of approval and the applicable building code requirements;

4. On the FOURTH CLAIM FOR RELIEF, for damages in excess of $10,000, as shall be established by proof, and for injunctive relief preventing Defendants from

interfering with completion of construction of the Townhouses, subject only to compliance with the prior conditions of approval and applicable building code requirements;

5. For its costs of suit;

6. For its reasonable attorneys' fees, recoverable under the provisions of 42 U.S.C. Section 1988, 42 U.S.C. Section 4654, and other applicable laws;

7. For such other relief as this Court deems just and proper.

Dated this July 11, 1985.

HOFFMAN, LIEN, FACCINTO & SPITZER

/s/ Robert Damon Spitzer
ROBERT DAMON SPITZER

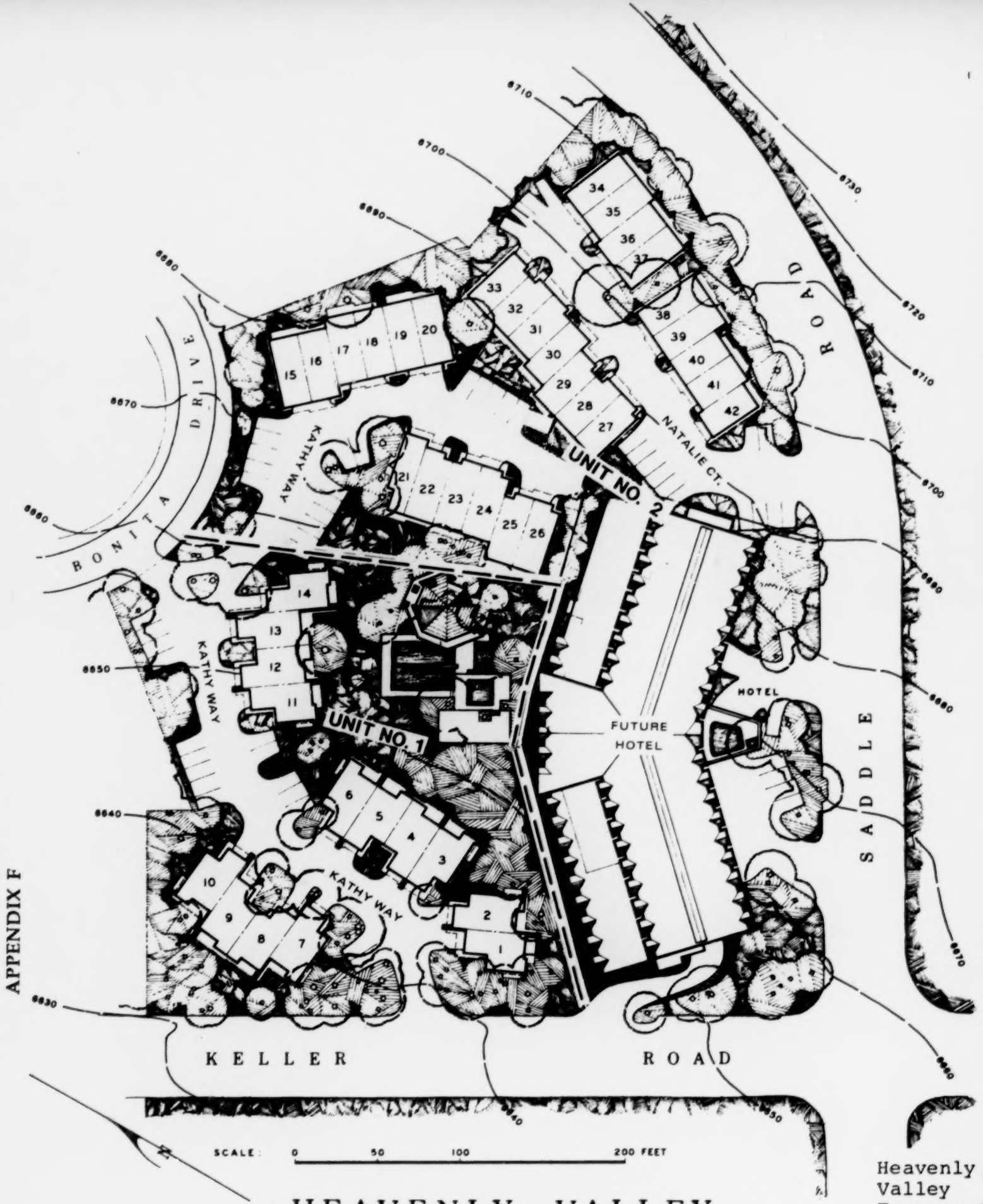
Attorneys for Plaintiff

VERIFICATION

I, MICHAEL PETRAGALLO, Vice President of Lakeview Development Corporation, Plaintiff herein, hereby declare that I have read the Complaint and know its contents and I certify, under penalty of perjury, that the information contained therein is true and correct.

/s/ Michael Petragallo
MICHAEL PETRAGALLO

July 11, 1985
DATE



Heavenly Valley Tramway & Ski Area

HEAVENLY VALLEY TOWNHOUSES & HOTEL

A PROJECT OF

LAKEVIEW DEVELOPMENT CORP.

(2)

No. 90-1613

Supreme Court, U.S.
FILED
JUN 10 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

LAKEVIEW DEVELOPMENT CORPORATION,
a California Corporation,

Petitioner,

v.

CITY OF SOUTH LAKE TAHOE,
a Municipal Corporation,
the TAHOE REGIONAL PLANNING AGENCY,
a separate legal entity created pursuant
to an interstate Compact between the States
of Nevada and California,

Respondents.

and

PEOPLE OF THE STATE OF CALIFORNIA
Ex Rel. John K. Van De Kamp,
Attorney General of the State of California,

Intervenor/Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

RESPONDENTS' JOINT BRIEF IN OPPOSITION

GARY A. OWEN
Counsel of Record
CROWELL, SUSICH, OWEN & TACKES, LTD.
Post Office Box 1000
Carson City, NV 89702
(702) 882-1311
Counsel for Respondent Tahoe Regional Planning Agency

DANIEL E. LUNGREN
Attorney General of the State of California
RICHARD M. FRANK
Acting Assistant Attorney General
RICHARD M. SKINNER
Deputy Attorney General
Counsel of Record
Office of the Attorney General
of the State of California
Post Office Box 944255
Sacramento, CA 94244-2550
(916) 327-7850
Counsel for Intervenor/Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Did the Ninth Circuit and the District Court properly apply California law to reject a vested rights claim where the developer had taken no action on its original permit over a 12-year time span?

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No. 90-1613

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October Term, 1990

LAKEVIEW DEVELOPMENT CORPORATION,
a California Corporation,

Petitioner,

v.

CITY OF SOUTH LAKE TAHOE, *et al.*,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

RESPONDENTS' JOINT BRIEF IN OPPOSITION

Respondents Tahoe Regional Planning Agency and the People of the State of California respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 915 F.2d 1290 (1990).

2RESPONDENTS' STATEMENT OF LEGAL PROVISIONS INVOLVED

Lakeview contends this case has constitutional dimensions, and that the Fifth and Fourteenth Amendments to the United States Constitution are implicated by the Ninth Circuit's decision. No such concern is present. Neither are any regulations of the Tahoe Regional Planning Agency at issue, despite Lakeview's statement to the contrary. Petition at 2-3.

The case involves only the application of California's "vested rights" law to one particular project. In decisions compatible with the law of California, both the District Court and the Ninth Circuit have held that Lakeview possesses no such vested right. No issues justifying ~~this~~ Court's attention are presented. See Rule 17.1 of the Rules of the Supreme Court.

RESPONDENTS' STATEMENT OF FACTS

Lakeview's complaint, filed in 1985, sought to establish that it has a "vested right", i.e., a current right to build a 28-unit townhouse development, based on a permit granted in 1969, even though major changes in land use regulations applicable to the project had been enacted in the 16-year period involved.

Key among the land-use changes were rules and plans promulgated by the Tahoe Regional Planning Agency (TRPA), a bi-state agency created by the Tahoe Regional Planning Compact between California and Nevada, Public Law 91-148, 83 Stats. 360; Cal. Gov. Code,

§§ 66800 et seq.; Nev. Rev. Stats. 277.190 et seq. (December 18, 1969), as amended by Public Law 96-551, 94 Stats. 3233; Calif. Govt. Code §§ 66802 et seq.; Nev. Rev. Stats., §§ 277.190-277.220) (December 19, 1980) (hereinafter referred to as, "Compact").

Lakeview has never applied for *any* permit for this project from TRPA. It has chosen instead to try to obtain immunity from the application of any of TRPA's regulations based on a claim that Lakeview's ability to build the 24-unit townhouses was vested.

The concept of a "vested right" derives from notions of governmental estoppel. There is some point where a developer of property is entitled, via the vested rights doctrine, to protection from subsequent changes in the laws which applied to his or her project at the time of project approval. (See generally Williams *American Land Planning Law*, Sec. 111.01-111.03 (1986 Rev.Ed.).) Each state, by statute, case law, or a combination, defines that point for its jurisdiction.

Under California law, applicable to Lakeview's situation, the essential elements of a vested right include (1) material or substantial construction expense (2) incurred in reasonable, good faith reliance upon (3) the governmental issuance of an appropriate and valid permit for the project. (*See*, e.g., *Avco Community Developers, Inc. v. South Coast Regional Commission*, 17 Cal.3d 785, 791-798, 132 Cal.Rptr., 386, 389-394, 553 P.2d 546, 550-554 (1976) (hereinafter cited as "Avco"); *Spindler Realty Corporation v. Monning*, 243 Cal.App.2d 255, 53 Cal.Rptr. 7 (1966),

certiorari denied, 385 U.S. 975 (1966); and *Anderson v. City Council*, 229 Cal.App.2d 79, 42 Cal.Rptr. 41 (1964).)[1]

According to Nat Sinclair, Lakeview's representative, Lakeview originally planned to build a townhouse and hotel development in three separate phases. First, Lakeview planned to develop 14 townhouse units (Unit 1) and sell them. Then it would build a second group of townhouses. (Unit 2 – the townhouses at issue), and presumably sell them. Finally, Lakeview planned to construct a 160-room hotel. (Deposition of Sinclair, (hereinafter referred to as, "Sinclair Depo."). (Clerk's Record, hereinafter cited as, "CR", 74, pp. 34-35, 68, 72, Sinclair Depo., CR 75, pp. 23-24.

Lakeview obtained a Special Use Permit (SUP) and permission to subdivide an undeveloped four-acre parcel from the City of South Lake Tahoe in 1969. (CR 67, Ex. D.)

The City's approval then went to the newly-created California Tahoe Regional Planning Agency (CTRPA) for the latter's review. CTRPA, as initially established, was not given any serious review responsibilities over commercial projects on the California side of the Lake Tahoe

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[1] In the District Court and in the Ninth Circuit, Lakeview attempted unsuccessfully to persuade the federal courts to ignore California's vested rights laws in favor of announcing a separate federal doctrine of vested rights. For reasons articulated by the Ninth Circuit, Petition Appendix at 8a-12a, Lakeview's quest was denied, and California law, as set forth in *Avco*, was deemed applicable to this case. Lakeview has not challenged that aspect of the Ninth Circuit's ruling in its Petition.

Basin. In such instances, CTRPA basically just mirrored the actions of local government.[2]

Consistent with its then-limited role, on June 18, 1969, CTRPA approved the Heavenly Valley Hotel and Townhouse SUP and subdivision map "subject to the conditions imposed by the City of South Lake Tahoe." (Lakeview's Excerpt of Record, at 100.)

Lakeview incorrectly asserts, "[T]here is little dispute that Lakeview . . . received all final, discretionary land use approvals necessary to undertake the project." (Petition at 9.) In fact, under the 1969 SUP and subdivision map approvals, which are all Lakeview ever essentially obtained, the City still required Lakeview to obtain building permits for each aspect of construction and also required that, "All buildings, tree removal and landscaping to be as approved by Architectural Review Committee of the Planning Commission, such approval to be obtained prior to issuance of any building permit for construction." (CR 67, Ex. F.)

After building the 14 townhouses in Unit 1, Lakeview, in 1974, obtained a foundation permit for six of the 24 townhouses at issue herein. That permit would only

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[2] (See Cal. Gov. Code, §§ 67000 et seq.) CTRPA was created by the California Legislature as a companion measure to its consent to the Tahoe Regional Planning Compact, which established TRPA. (See Cal. Gov. Code, §§ 66800 et seq.; Nev. Rev. Stats. §§ 277.190 et seq.; and P.L. 91-148, 83 Stat. 360 (Dec. 18, 1969).) Since the Compact did not authorize TRPA to review public works projects in the Tahoe Basin, California established CTRPA initially to provide that function at least on the California side of the Basin. (See generally *Raley v. California Tahoe Regional Planning Agency* 68 Cal.App.3d 965, 980-981, 137 Cal.Rptr. 699, 708-709 (1977).)

have allowed Lakeview to construct footings and a foundation for six of the units in Unit 2. (Lakeview's Excerpt, at 145-146). However, before it commenced any construction even pursuant to that limited permit, Lakeview decided not to proceed with the townhouses at that time. Lakeview abandoned the townhouse foundation permit in favor of beginning work on the hotel project. (Sinclair Depo., CR 74, pp. 91, 172; Sinclair Depo., CR 75, pp. 22-24; Finding of Fact No. 6, Petition Appendix at 34a-35a.)

To date, Lakeview has never expended any amount on actual construction of the townhouse project at issue. (See Finding of Fact No. 6, Petition Appendix at 34a-35a and No. 12, Petition Appendix at 36a; see also, e.g., Appellees' Supplemental Excerpt, which are photographs of the litigation property which accompanied TRPA's motion for summary judgment; the property, while rough-graded years ago, is wholly undeveloped.)

In July, 1985, Lakeview filed suit against TRPA in an effort to obtain a vested right against the application to its 28-unit townhouse project of that agency's regional plan, which carries out a bi-state and congressional mandate to protect Lake Tahoe's environment.

In the District Court, Lakeview claimed that its unconstructed, unapproved townhouse project was part of a unitary, mutually-dependent development. Because the Unit 1 townhouses and the 160-room hotel were completed in 1973 and 1984, respectively, Lakeview contended that the approvals obtained and the expenditures

made on these other parts were sufficient to vest Lakeview with the right to complete the 28-unit townhouse project.

The District Court concluded as a matter of law that the townhouse project was *not* dependent upon other elements (nor were the other elements dependent upon the 28-unit project).

Having determined that Lakeview's project stands alone, the District Court ruled that Lakeview could not rely on permits obtained or construction expenses incurred for other, separate projects in its vested rights claim for the 28-unit townhouse development.

The District Court held that Lakeview's project did not possess a vested right, and granted summary judgment to TRPA and to the People of the State of California.

On appeal, the Ninth Circuit affirmed, but on a different basis. It held that, even if Lakeview's project were deemed to have obtained "final discretionary approval" in 1969, Lakeview could not thereby assume that its approval would remain viable for more than 12 years, even though Lakeview had not yet commenced construction of its project.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Ninth Circuit's Decision Does Not Raise The Question Allegedly Presented In The Petition.

This case involves only the application of California's vested rights laws to an individual fact situation. It presents no federal questions, no opinion in conflict with

other Courts of Appeals decisions or the California courts, and no other appropriate basis for review pursuant to Rule 17.1 of the Rules of the Supreme Court.

Petitioner, by misapprehending the opinion of the Ninth Circuit, characterizes the result as depriving it of property rights in violation of constitutional principles. No such consequence exists.

Lakeview's complaint sought to establish a vested right to build a project, notwithstanding changes in the land use regulatory framework over time. It has been unsuccessful in that aim through two levels of judicial review. *Because Lakeview never has been found to possess the vested right it seeks, it hardly can complain that such a right has been improperly taken from it.*

As is discussed in more detail below, *any* of the paths chosen by either the Ninth Circuit or the District Court would be a valid basis for the denial of a vested right. All are based on undisputed facts, and all conclude that Lakeview has never attained the threshold elements necessary to possess a vested right. (See, e.g., *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957) ["A successful party in the District Court may sustain its judgment on any ground that finds support in the record."].) The decision below is demonstrably correct. It involves no issue requiring Supreme Court review.

The Ninth Circuit, addressing Lakeview's contentions, assumed that Lakeview, in 1969, had obtained all the necessary permits to build the Unit 2 townhouses. *But that is all the Ninth Circuit assumed:*

> "We assume, without deciding, that the California Supreme Court would recognize an exception to the rule in the case of sufficiently specific special use permits. We also assume, without deciding, that the special use permit that Lakeview received in 1969 was sufficiently specific to meet the requirements of the *Avco* decision. For even if we were to decide these issues in favor of Lakeview, its claim to a vested right would still fail, because it did not act expeditiously enough in proceeding with the development of the Unit Two townhouses." (Petition Appendix at 18a.)[3]

In its ruling, the Ninth Circuit hearkened to the earliest expositions of the vested rights doctrine in California, which declare that, " '[T]he vested rights theory is predicated upon estoppel of the governing body.' " (*Spindler Realty Corp. v. Monning, supra*, 243 Cal.App.2d, at 269, 53 Cal.Rptr., at 15, quoting from *Anderson v. City Council, supra*, 229 Cal.App.2d, at 89, 40 Cal.Rptr., at 47; see also *Avco, supra*, 17 Cal.3d, at 793, 132 Cal.Rptr, at 391, 553 P.2d, at 551.)

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[3] The Ninth Circuit offered no view on Lakeview's failure to expend any funds in actual construction of the townhouses, yet such expenditures are a necessary element of a vested right under California law. (*Avco, supra*, 17 Cal.3d, at 793, 132 Cal.Rptr., at 391, 553 P.2d, at 551.) Moreover, as the Ninth Circuit itself conceded, absent its assumption that Lakeview possessed the necessary permit for its project, the Court would have had to confront the issue of whether Lakeview *had* obtained the "final, discretionary approval" required. Petition Appendix at 18a, n. 11.

Thus, even if one were to reject the Ninth Circuit's analysis of the "reasonable reliance" issue, Lakeview's failures to meet the other elements of the vested rights test under *Avco* would still bar its vested rights pursuit.

The Ninth Circuit pointed out:

> "Lakeview has offered no evidence that any governmental agency placed obstacles in its way to developing its project expeditiously until 1981, when Lakeview first indicated it was ready to build the Unit Two townhouses. By that time twelve years had elapsed since the time Lakeview had received its special use permit. In 1969, it could not reasonably have been expected that the land on which Unit Two was to be built would still be undeveloped in 1981. . . . When, as in this case, the government does not interfere until well after the time the developer could have completed the entire project, the reason for recognizing a vested right evaporates." Petition Appendix at 19a-20a.

The point, which the Ninth Circuit makes clear, is that one cannot meet the "reasonable reliance" test of *Avco* in circumstances where 12 years elapse without construction between the granting of the original permit and the intervention of government:

> "[T]he developer should not be able to estop the government when the project temporally exceeds the scope of that approved. In other words, a government's commitment to a 'planned unit development' is necessarily conditioned on the developer's proceeding at a pace reasonably close to that contemplated at the time the project was approved. If the public is to be deprived of its power to control pollution and other problems caused by overdevelopment, it should be deprived only to the extent necessary to ensure private parties a reasonable degree of certainty about the legal status of their investments." (Petition Appendix at 21a.)

In this case, Lakeview received what the Ninth Circuit assumed, arguendo, was "final, discretionary

approval" for its Townhouse Unit 2 in 1969. From that point on until suit was filed, Lakeview ignored a series of critical events which obligated any reasonable person to investigate the consequences.

In 1969, Congress enacted the Tahoe Regional Planning Compact, establishing TRPA as a regional agency with a mandate to protect Lake Tahoe's threatened natural environment. TRPA shortly thereafter adopted a regional plan for the Lake Tahoe Basin, which plan encompassed numerous constraints on harmful development practices and projects.

In 1973, California enacted a law giving CTRPA expanded authority to protect that state's portion of Tahoe from environmental degradation. Lakeview not only knew of this development, but altered its own plans in an effort to beat CTRPA's timetable for enactment of more stringent land use controls.

In 1980, California and Nevada reached agreement on an amended bi-state compact, and Congress adopted those changes in an enactment which directed TRPA more strongly than ever to fulfill its mission of protecting Lake Tahoe. Key in those directions was a mandate to TRPA promptly to adopt a new regional plan which would attain specific environmental standards for the Basin. (See *People of the State of California v. Tahoe Regional Planning Agency* (9th Cir., 1985) 766 F.2d 1308.)

In 1981, the City of South Lake Tahoe investigated Lakeview's vested rights status and reported adversely to Lakeview's claim. (CR 67, Exh. D.) Lakeview consulted counsel regarding this report, and its representative was

advised that its counsel agreed that Lakeview possessed no vested right to develop the Unit 2 townhouses.

Later that year, TRPA wrote Lakeview's lawyers, asking them to apply to the agency for an administrative determination of its vested rights status concerning those townhouses. Lakeview did not follow up.

In 1983, CTRPA successfully sued the entity which had purchased the unfinished hotel site from Lakeview in 1979. In that suit, a court ordered construction halted because serious questions existed whether the hotel possessed a vested right vis-a-vis CTRPA. (That case was settled before final judicial resolution.) Sinclair, Lakeview's manager, submitted affidavits on behalf of the hotel owners in that litigation. Thus, Lakeview well knew of its consequences and potential import to its own situation.

Through all these significant developments, Lakeview declined to build its project and declined to inquire of any of the regional agencies as to the status of its 1969 permit from the City and the pre-1974 CTRPA. In oversimplistic obduracy, it maintained that, no matter what occurred, it was entitled to rely on that 1969 action indefinitely.

Such a stance, the Ninth Circuit declared, was not reasonable, given the passage of 12 years without action. That fact, under the circumstances of this case, the Court of Appeal found to be dispositive of Lakeview's vested rights claim.

The Ninth Circuit did *not* conclude that Lakeview ever possessed a vested right, contrary to Lakeview's

assertion in its petition. Petition at 7. Thus, there are no constitutional issues properly raised in this case.

2. Even If Lakeview Was Entitled To Indefinitely Delay Construction, It Still Possesses No Vested Right.

A lengthy delay without construction was not Lakeview's only failing in its vested rights pursuit. California law, it will be recalled, requires a proponent to incur substantial construction expense in reasonable reliance on a valid permit for its project. (*Avco, supra,* 17 Cal.3d, at 791-798, 132 Cal.Rptr., at 389-394, 553 P.2d, at 550-554.)

A. Lakeview Has Expended No Construction Funds On Its Townhouse Unit 2.

The parcel where Lakeview's Townhouse Unit 2 was proposed remains, today, 22 years after the SUP issued, a vacant lot. (See Appellees' Supplemental Excerpt.) In its petition, Lakeview claims to have "spent (or incurred debt) in excess of $13 million" in building "approximately 85%" of the project at issue. Petition at 3. To arrive at this figure, Lakeview cites monies spent or debt incurred on construction of *different* townhouse units and on a hotel, which was built by a separate entity. Lakeview includes acquisition, survey costs and other preconstruction expenses; lawyer fees incurred in this litigation; funds spent in response to abatement orders to end erosion and water quality degradation from the property site; and money spent *after* it became obvious that TRPA did not regard the townhouse project as having a vested right. None of the monies listed by Lakeview are recognized

under state law as contributing to Lakeview's vested rights claim. The California Supreme Court, in this context, has noted:

> " . . . [N]either the existence of particular zoning nor work undertaken pursuant to governmental approvals *preparatory to construction of buildings* can form the basis of a vested right to build a structure which does not comply with the law applicable at the time a building permit is issued." (*Avco, supra,* 17 Cal.3d at 792-793; 132 Cal.Rptr., at 391, 553 P.2d, at 551; emphasis added.)

If each dollar claimed by Lakeview is carefully examined, as was done in the District Court and in the Ninth Circuit, there can be no dispute that, as found by the District Court Judge, "Lakeview failed to construct improvements on the subject property or to incur substantial liabilities in respect to same." Petition Appendix at 38a.

B. Lakeview Neither Sought Nor Obtained Final Governmental Approval To Construct Townhouse Unit 2.

It has been a major argument of Lakeview throughout this case that its claim should not be denied based merely on its failure ever to have obtained building permits for Townhouse Unit 2.[5] Key to that argument is the notion, not adopted under well-established California state law, that as long as all final, discretionary land use approvals have been obtained, then the failure of a

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[5] We discount the foundation permits for six units which Lakeview briefly held and then abandoned in 1974.

proponent to secure a ministerial permit should not bar the finding of a vested right. (See, e.g., *Oceanic California, Inc. v. North Central Coast Regional Commission*, 63 Cal.App.3d 57, at 67, 133 Cal.Rptr. 664, at 670 (1976).) However, even if the foregoing general principle is accepted, as was assumed by the Ninth Circuit herein, Lakeview is not aided.

Lakeview, as noted, asserts that "there is little dispute" that it had "applied for and received all final, discretionary land use approvals necessary to undertake the project." Petition at 9. However, an examination of this contention reveals its falsity.

At all relevant times, Lakeview was obligated to obtain a waste discharge permit or waiver from the California Regional Water Quality Control Board, Lahontan Region, to construct the Unit 2 townhouses. (See Cal. Water Code, §§ 13264(a) and 13265.) In responding to California's Interrogatory No. 80 (CR 67, Ex. EE), Lakeview admitted it had never applied for such a permit. Lakeview's petition ignores this fatal obstacle to its claim.

In addition, on the face of the SUP granted for this project in 1969 by the City of South Lake Tahoe and by CTRPA, Lakeview was required to obtain not only a building permit for each building it proposed to construct, but to secure approval from the City's Architectural Review Committee of the Planning Commission for "[a]ll buildings, tree removal and landscaping. . . . " (CR 67, Ex. F.)

Moreover, the City Manager, by letter of August, 1970, pointed out the requirement for plan checks of

construction drawings prior to the issuance of building permits. (Lakeview's Excerpt at 118.)

Lakeview baldly contends that the completion of architectural review, plan checking and issuance of building permits were merely ministerial acts. (Petition at 15, n. 23.) But it supplied no evidence to dispute the plain language of the SUP and of the City Manager's cautionary letter.

Lakeview thus is in a situation like that of the developer in *Patterson v. Central Coast Regional Commission*, 58 Cal.App.3d 833, 844-845, 130 Cal.Rptr. 169, at 176 (1976), where a similar contention was addressed:

> "Although respondent so asserts . . . , the record contains no evidentiary support for his claim that he had in fact obtained all final discretionary approvals and acted in reliance thereon . . . , or that he had complied with all legal requirements for issuance of a building permit, making the issuance a ministerial act. [Citations.] Thus, the refinement of the vested rights principle noted above does not aid respondent, for the record does not allow either the trial court or this court to find that, in spite of the lack of a building permit, respondent had acquired a vested right to construct the houses. Mere approval of and expenditure on subdividing and grading activities, without more, create no additional vested rights beyond the scope of such limited approval [citations] and plans regarding future use do not extend the developer's protection. [Citation.]"

C. Lakeview's Townhouse Unit 2 Was Independent Of Other Elements Included In The 1969 Special Use Permit.

Lakeview presents its case to this Court on the erroneous and previously-rejected assumption that its Unit 2 townhouses were an integral and dependent part of another townhouse unit and a 160-room hotel. By such a maneuver, Lakeview spins a meritless argument that funds spent and construction which occurred on the other townhouses and on the hotel should count in the matrix of elements which are required for Lakeview to succeed in its vested rights quest for the Unit 2 townhouses.

However, Lakeview has been unsuccessful to date in persuading any court that the Unit 2 townhouses were, in reality, connected to other elements in the area. The District Court's decision is instructive:

> "As a matter of law the subject property is independent from and not connected with contiguous parts of the development. . . . Lakeview's approvals and construction of other portions of its development cannot, therefore, provide a basis for a vested right for the subject property." Petition Appendix at 38a.

Lakeview, as it did in the Ninth Circuit, castigates the District Court's decision as an improper determination of "significant disagreements as to material facts." (Petition at 15; and see n. 22.) What Lakeview ignores is that all the *facts* concerning the issue of the project's dependence or independence on other parts were undisputed; only the *conclusion* that one might draw from those facts was contested, and *that* conclusion was properly a legal one.

(*Compare Court House Plaza Co. v. City of Palo Alto*, 117 Cal.App.3d 871, 173 Cal.Rptr. 161 (1981)).

The correctness of the District Court's conclusion on this point is demonstrated by the following uncontested evidence:

a. Unit 2 is on a separate parcel or parcels from any other portion of the claimed "integral project". (CR 67, Exhs. J & K.)

b. Unit 2 is a separate subdivision from Unit 1. (*Idem.*)

c. Lots in Unit 1, with all its recreational amenities, were sold to the public as a complete development under California's Subdivided Lands Act, Cal. Bus. & Prof. Code § 11000 et seq. There were no guarantees made to any purchaser that Unit 2 would be constructed. All acquisitions by members of the public of townhouse ownership in Unit 1 have been made over 15 years in acknowledgement of this fact.[6]

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[6] The purpose of the Subdivided Lands Act is to prevent "fraud and sharp practices" by developers of subdivisions of projects with five or more units. (*In re Sidebotham* (1938) 12 Cal.2d 434, 436, 85 P.2d 453, 454; *Westbrook v. Summerfield, Roberts, etc., Inc.* (1957) 154 Cal.App.2d 761, 766, 316 P.2d 691, 694.)

Under the Act's provisions, which are designed to protect purchasers of newly-subdivided parcels of real property, the developer must advise the state's Department of Real Estate of, among other things, who will furnish community and recreational facilities to the subdivision. (Cal. Bus. & Prof. Code, § 11010(j).) The state then issues a public report, setting out

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d. Both the hotel and Unit 1 have operated entirely without the existence of Unit 2, which remains unconstructed to date.

e. Unit 1 and the hotel have been in separate ownership since 1979, with separate management and even litigation currently

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these facts (*id.*, § 11012; *Bodily v. Parkment Village Green Home Owners Assn., Inc.* (1980) 104 Cal.App.3d 348, 163 Cal.Rptr. 658.)

Significantly, the public report for the Unit 1 townhouses makes the recreational facilities a part of the Unit 1 project, and places the entire financial burden of maintenance of them on Unit 1. (Lakeview's Excerpt, at 115-117.) Lakeview has never sought modification of this public report to include any part of Unit 2 since the report issued in 1970.

It is also important to note that Lakeview obtained financing for Unit 1 *separate* from Unit 2. (CR 74 at 29-30.) Had that not been the case, sections 11013.1-11013.2 of the Cal. Bus. & Prof. Code would have severely limited Lakeview's ability to sell Unit 1 townhouses before the townhouses on Unit 2 were built. Pursuant to those statutes, had the projects been financed together as a single project, Lakeview either would have had to persuade a lender to release any lien on individual townhouse sales, which lien would have derived from the blanket encumbrance covering both Unit Nos. 1 and 2, or Lakeview would have had to put the townhouse sales proceeds in trust, post a bond, or put the title to the entire subdivision in trust until such a release from the blanket encumbrance was obtained.

Having derived significant advantage to itself by separating Unit 1 from Unit 2, as set forth above, Lakeview should be estopped to claim now – after the public report and after lot sales have taken place in reliance thereon – that the two projects really are just one.

on-going between the two ownership groups. (CR 74 at 142-143.)

f. The hotel has never shared with Unit 1 the right to use any of the recreational facilities built for Unit 1 and is not entitled to use them (CR 74 at 74.)

g. When the hotel owner was asked by the regional water quality control agency, in 1974, to do a waste discharge report for its development, the response was to describe the site as encompassing only the hotel parcel and to outline mitigation measures applicable only to the hotel project. No mention of either townhouse phase was included. (CR 67, Exhs. Y, Z & AA.)

h. Unit 1 was completely built out before any units in Unit 2 were ever constructed. (Lakeview's Excerpt at 59.) Between 1973-1974, when the Unit 1 townhouses were completed, and the filing of this suit in 1985, no substantial construction has taken place on Unit 2.

i. The hotel was built completely before any units in Unit 2 were ever constructed. (Lakeview's Excerpt at 73.) Between 1979, when Lakeview sold the hotel, which had then been only partially constructed, and the filing of this suit in 1985, no substantial construction has taken place on Unit 2.

j. The hotel parcel was owned and built by an entity separate from the entity which owned the townhouse property. (CR 74 at 58.)

k. The hotel was completed by owners different than Lakeview and to a different design than Lakeview had originally contemplated. (Lakeview's Excerpt at 68-69; CR 68 at 25 (Para. 44); CR 68, Ex. 43.)

In contrast to the foregoing, the only thing Lakeview can offer in support of its "unified" project is that in 1969, at the outset of Lakeview's development effort, it once *intended* that the three units – the hotel and the two townhouses – would operate together.

But, due to Lakeview's own decisions, and not due to any intervention by any government, Lakeview abandoned its original concept in 1973-1974, when it switched from its original plan to build the Unit 2 townhouses in favor of a hasty commencement of construction on the hotel. That decision ultimately led to Lakeview's sale of the hotel property in 1979 prior to its completion. If the project were one integral project, as Lakeview now contends, how could it remain so when the hotel was sold to strangers, when its management was turned over to others, when a lawsuit erupted between the hotel owners and Lakeview?

The applicable principles for determination of whether a project is unified or not for purposes of California's vested rights doctrine have been articulated in *Court House Plaza Co. v. City of Palo Alto, supra,* 117 Cal.App.3d 871, 162 Cal.Rptr. 161 (hereinafter referred to as, *"Court House Plaza"*). There, the developer received approval under a planned community zoning district to construct a single building in two phases. (*Court House Plaza,* 117 Cal.App.3d, at 878, 162 Cal.Rptr., at 162.)

In the first phase, the developer was to construct the first four stories of the structure on one parcel. In the second phase, six additional stories were planned. (*Idem.*)

The developer constructed the first four stories. Some years later, when the developer sought to build the rest of

the to-be 10-story building, the City declined to grant a permit, citing a new lower city height limit and other considerations.

The developer asserted it had expended "in excess of $450,000" to accommodate the upper floors when it built the first phase. The Court nevertheless denied that any vested right had thus been created to add six more stories to the existing building:

> "Once the appellant here had made substantial expenditures in reliance on the Phase 1 permits, it acquired a vested right to complete the four-story building . . . but no such right ripened as to Phase 2 for which no permits or other final approvals were obtained. Appellant essentially assumed the risk that the building might not be completed as planned since it was never exempted from the requirement of further permits and approvals before the six-story addition could be constructed, or from complying with all subsequently enacted codes." (*Court House Plaza*, at 117 Cal.App.3d, at 885, 162 Cal.Rptr., at 167.)

Lakeview's contentions do not demonstrate even as good a claim as was rejected in the *Court House Plaza* case. In *Court House Plaza*, the development was located on the same parcel; Lakeview chose to divide its parcel into separate parts for each unit. In *Court House Plaza*, the development was continuously owned by the same developer; here, Lakeview has never owned the hotel parcel at all, but even the ownership group which once owned it sold all its interest in it in 1979. (Lakeview's Excerpt at 68.) In *Court House Plaza*, the underlying structure was

voluntarily built oversize to accommodate six extra stories – a feature necessary *only* if the developer contemplated additional height on its building; Lakeview, which cites a recreation complex as inferring a unified project, Petition at 7, n. 13, was required to install that complex by its lender and by the California Department of Real Estate as a condition of being allowed to build and sell townhouses in *Unit 1*, whether or not Unit 2 ever was built. (Sinclair Depo., CR 74 at 28-29, 73-74.) Moreover, there is nothing in the hotel project which is dependent on the townhouses in Units 1 or 2 or vice versa. And, the hotel has never borne any share of the cost of building the common facilities for the Unit 1 townhouses, and is not entitled to use them.

There simply are no material indicia that all the townhouses *and* the hotel have been part of even a single *plan* since 1978-1979, even if mere planning without permits and without construction thereunder were enough to create vested rights in California.

3. Summary Judgment Was An Appropriate Procedural Vehicle By Which To Resolve Lakeview's Contentions

As it did before the Ninth Circuit, Lakeview asserts that *this Court* has "repeatedly held" that land use cases "are particularly unsuited for summary judgment."

Petition at 19. No authority is presented for this extraordinary claim, as none exists.[7]

Nothing in the Federal Rules of Civil Procedure, and nothing in this Court's – or any court's – pronouncements suggests any *per se* rule against the use of the summary judgment procedure in land use matters.

While courts are bound to exercise caution in complex litigation to ensure that no substantial issues of material fact obtain, the summary judgment procedure is generally available in all civil actions, without restriction. (See, e.g., *Daily Press, Inc. v. United Press International* (6 Cir., 1969) 412 F.2d 126, 128-129, certiorari denied, 396 U.S. 990. For a case where summary judgment was upheld in an inverse condemnation case, see *Ocean Acres Ltd. v. Dare County Board of Health* (4 Cir., 1983) 707 F.2d 103.)

It is certainly true that this Court has found it difficult to assert blanket rules for determining whether inverse condemnation has taken place. (See *Kaiser Aetna v. United States, supra,* 444 U.S., at 175.) However, the

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[7] Lakeview cites *Keystone Bituminous Coal Ass'n. v. DeBenedictis* 480 U.S. 470, 494-495 (1987) and *Kaiser Aetna v. United States* 444 U.S. 164, 175 (1979) in support of its claim that summary judgment is somehow inappropriate in land use cases. Petition at 19, n. 26. Neither of those cases discusses the propriety of summary judgment proceedings in this or any context.

Unhelpful, too, are the myriad cases cited in the Petition at 21, n. 29. Those are cases where, for whatever reasons, procedures other than summary judgment were used to reach a decision. Their existence does not logically support a conclusion that summary judgment is improper in *all* cases.

Court has never proclaimed any rule prohibiting the use of Rule 56 of the Federal Rules of Civil Procedure in such cases, much less a case involving only a vested rights claim as this one.

Lakeview confuses this Court's legitimate concern that all relevant facts be known to a court considering a "takings" case with its own belief that such a factual inquiry is impossible using the summary judgment procedure.

This case, however, presents a good demonstration of the merits of summary judgment as a means of resolving uncontested factual situations.

The record below consists essentially of items taken from the public record: applications, correspondence with various officials, court documents and materials from related litigation and the like. These materials were supplemented by excerpts from the deposition testimony of Nat Sinclair, Lakeview's longtime owner and manager. Issues of credibility simply were not relevant; no *material* fact was disputed; and the need for a trial to introduce the evidentiary materials would have been a waste of time and resources.[8]

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[8] Lakeview, Petition at 14, n. 21, infers impropriety by counsel for the State of California in the latter's submission of an affidavit and exhibits as part of the respondents' motion for summary judgment in the District Court. Counsel's affidavit explained the chronology of the construction of the hotel, based on documents and records produced via discovery in prior litigation between CTRPA and the owners of the hotel, successors to the Lakeview group. The exhibits consisted of

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Lakeview has made identical arguments regarding the summary judgment procedure to the District Court and to the Ninth Circuit without success. Its illogical and incorrect contention provides no basis for this Court's further involvement in this case.

CONCLUSION

For the reasons set forth, the petition for a writ of certiorari should be denied.

Respectfully submitted,

GARY A. OWEN, ESQ.*

Counsel for Respondent Tahoe Regional Planning Agency

DANIEL E. LUNGREN
Attorney General of the
State of California

RICHARD M. FRANK
Acting Assistant Attorney General

RICHARD M. SKINNER*
Deputy Attorney General

Counsel for Intervenor/Respondent People of the State of California

*Counsel of Record

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those documents and records. Lakeview objected to most of these materials, but the District Court overruled *all* of those objections; Lakeview did not appeal any of those rulings in the Ninth Circuit.

Significantly, Lakeview has not suggested that any of the material facts set forth in the affidavit or exhibits were inaccurate.